

EXHIBIT 6

*Phil Paul v.
Intel Corporation*

*Hearing
May 1, 2007*

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**Phil Paul v.
Intel Corporation**

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE
IN RE:)
INTEL CORP. MICROPROCESSOR)MDL Docket No. 05-MD-
1717-JJF)
ANTITRUST LITIGATION,)
PHIL PAUL, on behalf of)
Himself and all others)
similarly situated,) Civil Action No. 05-485-JJF
Plaintiffs,) CONSOLIDATED ACTION
v.)
INTEL CORPORATION,)
Defendant.)
Tuesday, May 1, 2007
10:00 a.m.
Courtroom 4B
844 King Street
Wilmington, Delaware
BEFORE: SPECIAL MASTER VINCENT J. POPPITI
APPEARANCES:
RICHARDS, LAYTON & FINGER
BY: FREDERICK L. COTTRELL, III, ESQ.
-and-
O'MELVENY & MYERS, LLP
BY: JENNIFER LASER, ESQ.
Counsel for AMD

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APPEARANCES CONTINUED:
POTTER, ANDERSON & CORROON, LLP
BY: RICHARD L. HORWITZ, ESQ.
-and-
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BY: RICHARD A. RIPLEY, ESQ.
Counsel for Intel
PRICKETT, JONES & ELLIOTT
BY: J. CLAYTON ATHEY, ESQ.
-and-
COHEN, MILSTEIN, HAUSFELD & TOLL
BY: DANIEL A. SMALL, ESQ.
BY: BRENT W. LANDAU, ESQ.
-and-
FINKELSTEIN THOMPSON, LLP
BY: RICHARD M. VOLIN, ESQ.
BY: KAREN J. MARCUS, ESQ.
Counsel for Class Plaintiffs
MORRIS, NICHOLS, ARSHT & TUNNELL
BY: MARY B. GRAHAM, ESQ.
-and-
QUINN EMANUEL
BY: ROBERT W. STONE, ESQ.
-and-
FRY'S ELECTRONICS
BY: BRIAN D. HENRI, ESQ.
Counsel for Fry's Electronics
Also Present:
David Carlikhoff, Esq.

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[1] **SPECIAL MASTER POPPITI:** Good morning, [2] all. This is a time we've set for a hearing on [3] class plaintiffs' application to compel Fry's [4] Electronics, Inc. to produce transactional data [5] in response to the subpoena issued on June 23rd [6] of 2006.
[7] Counsel, before we proceed, let's [8] make a record of all those that are present, [9] please.
[10] **MR. ATHEY:** Good morning, Your [11] Honor. Clayton Athey from Prickett, Jones & [12] Elliott.
[13] **SPECIAL MASTER POPPITI:** Thank you, [14] Mr. Athey.
[15] **MR. ATHEY:** I believe you know my [16] co-counsel, Daniel Small.
[17] **SPECIAL MASTER POPPITI:** I indeed [18] do.
[19] **MR. ATHEY:** Brent Landau from Cohen [20] Milstein as well. And Richard

Volin and his [21] associate, Karen Marcus, from Finklestein Thomas.

[22] **SPECIAL MASTER POPPITI:** Thank you [23] very much.

[24] **MR. COTTRELL:** Good morning, Your

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[1] Honor. Fred Cottrell for AMD.
[2] With me from the O'Melveny firm in [3] Los Angeles is Jennifer Laser. Jennifer has one [4] of the main roles at O'Melveny on third-party [5] discovery, so I'm sure everybody hopes this may [6] be the last third-party discovery issue.
[7] I think we all know it will not be. [8] So Jennifer is here today to listen and perhaps [9] even participate, if necessary.
[10] **SPECIAL MASTER POPPITI:** Thank you, [11] Mr. Cottrell.

[12] **MR. COTTRELL:** Thank you, Your [13] Honor.

[14] **MR. HORWITZ:** Rich Horwitz from [15] Potter Anderson on behalf of Intel. With me [16] today, Rick Ripley from Bingham McCutcheon.

[17] **SPECIAL MASTER POPPITI:** Nice to see [18] you again, sir.

[19] **MS. GRAHAM:** Good morning, Your [20] Honor. Mary Graham from Morris Nichols on behalf [21] of Fry's Electronics.

[22] And with me are Robert Stone from [23] Quinn Emanuel. He will be arguing on behalf of [24] Fry's today.

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[1] And also with us are Brian Henri, [2] legal counsel in-house at Fry's. And he's here, [3] both because this is important to Fry's and also [4] in case there — if there's a desire on the part [5] of the Court to hear from him, he'd be happy to [6] address the Court.

[7] **SPECIAL MASTER POPPITI:** Thank you, [8] Ms. Graham. Welcome, counsel.

[9] **MR. STONE:** Good morning, Your [10] Honor.

[11] **MR. HENRI:** Good morning.

[12] **SPECIAL MASTER POPPITI:** Counsel, [13] before we proceed, I think it may be appropriate [14] for me to maybe cut through several of the — at [15] least one of the issues that was raised by virtue [16] of Fry's response to your application.

[17] Fry's contests the jurisdiction of [18] this Court to entertain, that is, consider and [19] rule on your motion. Let me do it this way: I [20] do intend, notwithstanding any other business [21] that we conduct today, to issue a finding, [22] proposed finding and recommendation to Judge [23] Farnan that the Court conclude that this Court [24] does have jurisdiction to entertain the

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[1] application.

[2] And the reason why I intend to issue [3] a formal document to the Court, notwithstanding [4] anything else I may do today, is so that there [5] can be due consideration by the Court and a [6] ruling. That is, a ruling that gets made for [7] purposes of this district's jurisprudence.

[8] I would note for purposes of [9] creating a very brief record — counsel, you may [10] want to just take your seat for a moment, if you [11] don't mind.

[12] **MR. SMALL:** Sure, Your Honor.

[13] **SPECIAL MASTER POPPITI:** That [14] Fry's — and I will apologize at the front end of [15] this proceeding. There will be some reference to [16] the hearing in advance of the issuance of my [17] report to the Court on the protective order [18] that's in place in this case, and I apologize for [19] referring to the entity as Fry.
[20] I would anticipate that there would [21] hopefully be no need to go back and correct the [22] record, but if there is an application to do [23] that, if you'll make note of that, I will be [24] happy to do that.

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[1] Fry's cites the case of Visx — VI [2] S.X., Inc. versus Nidek, N-I-D-E-K Co., 208 F.R.D. [3] 615. That's 616 in that case. It's a Northern [4] District of California case in the year 2002 — [5] for the proposition that the Chancery Court in [6] multi-district litigation does not have the [7] authority to — the power to enforce a [8] documents-only subpoena.

[9] It is interesting, and I say this [10] gently, that both Fry's and the class ignored a [11] later decision issued by the same Court, which [12] decision declined to follow the Visx decision.

[13] That case is In Re: Welding Rod [14] Products Liability litigation at 406 F.Supp 2d [15] 1064, a Northern District of California case in [16] the year 2005.

[17] In Welding Rod, the Court recognized [18] that the stated purpose of coordinating pretrial [19] proceedings in multi-district litigation is to [20] promote the just and efficient conduct of such [21] actions. And there is a reference in that case [22] at Page 1066.

[23] The Court also acknowledged that [24] most courts that have addressed that very issue,

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[1] most courts have concluded that 28 U.S.C. Section [2] 1407(b) empowers a multi-district litigation [3] transferee Court to exercise the power of any [4] other district, including the enforcement of [5] documents-only subpoenas. The reference is at [6] Page 1066.

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[7] I have taken the opportunity, and [8] you'll see this in the written document that I [9] expect will issue in short order to review the [10] relevant case law regarding the authority of a [11] transferee Court in multi-district Court [12] litigation to adjudicate discovery disputes in [13] connection with non-parties.

[14] And I am satisfied that the majority [15] view is the better reasoned approach. And I also [16] would expect that the Third Circuit would adopt a [17] view that it expressed in dicta in the case of *In Re: Flat Glass*, antitrust litigation at 288 F. [19] 3d 83 at note 90. That's the Third Circuit in [20] the year 2002.

[21] That footnote reads in part that [22] Section 1407 (b) "empowers the transferee judge [23] in multi-district cases to act not only on behalf [24] of the transferee district, but also with the

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[1] powers of a district judge in any district for [2] the purpose of conducting pretrial depositions in [3] such coordinated or consolidated proceedings. [4] I'm mindful that the focus was on the conduct of [5] depositions, but I conclude that the Third [6] Circuit, in examining its own dicta, would take [7] what I conclude to be the better reasoned [8] approach and the majority view."

[9] So I do conclude for purposes of [10] this proceeding that the Court has the authority [11] to entertain the application. Counsel, if you [12] believe there's any need for you to make further [13] record in this regard, I'm happy to permit you to [14] do that.

[15] MR. STONE: We don't believe so, [16] Your Honor.

[17] MR. SMALL: Nothing for the class [18] plaintiffs, Your Honor.

[19] SPECIAL MASTER POPPITI: Thank you. [20] The other thing that I'd like to [21] turn to — just give me one moment, please.

[22] I'd like to have some discussion [23] with you about the protective order that exists [24] in this case. And I'd like the discussion that

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[1] you all have with me to be framed against the [2] following backdrop, if you will.

[3] I think it's fair to say that the [4] process leading up to Judge Farnan's entry of the [5] protective order in this case was unique to [6] proceedings of this nature. I think it's fair to [7] say that the uniqueness is literally demonstrated [8] by the schedule of opportunities for all parties [9] to have input to the protective order. And all [10] non-parties, third parties to have

input into [11] that protective order.

[12] Without giving the actual deadlines [13] of the process, I don't think it's important to [14] do that in advance of a scheduled proceeding. [15] Fry's, as a third party, along with all other [16] third parties, have the opportunity to provide [17] written objections and comments with respect to [18] the proposed order.

[19] Fry's did that on May the 19th of [20] 2006, along with a host, if not all of the other [21] third parties providing their objections and [22] comments. Subsequent to receiving those [23] comments, and consistent with the scheduling [24] order relating to the protection order of

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[1] protection, a hearing was conducted on June the [2] 12th of 2006.

[3] I think it's fair to suggest that my [4] style in conducting hearings of this nature was [5] no different on June 12th than it was yesterday [6] or than it will be today. And that is, I believe [7] all of those that were present had a full and [8] fair opportunity to not only explore their [9] objections and comments with the Court, but also [10] had a full and fair opportunity out of the [11] presence of the Court to continue to negotiate [12] provisions of the parts of the protective order [13] that were stipulated.

[14] Fry's did not choose to appear at [15] that hearing, and there were no arguments, [16] therefore, advanced to support Fry's objections [17] and comments. Notwithstanding that, and I think [18] it was very clear before going into the [19] proceeding and it was certainly very clear during [20] the conduct of the proceeding, that all [21] objections and comments that were offered would [22] be considered.

[23] Counsel that was present [24] representing the interest of some third parties

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[1] in the course of their respective presentations [2] suggested to the Court that notwithstanding the [3] comments in the courtroom, that they were not [4] waiving any of their objections that were made in [5] their written submittal.

[6] In reviewing the decision, not a [7] decision, the report and recommendations [8] regarding the proposed protective order, with [9] respect in particular to Fry's May 19, 2006 [10] filing, reference was made to that filing in a [11] multiple — in a number of places in the document [12] itself. And, in fact, — just give me a minute, [13] please.

[14] With respect to comments made to [15] Subparagraph 6c, and I think these paragraphs and [16] subparagraphs are

all, to some extent, etched in [17] our minds. The Court received comments from Best [18] Buy, Dell, Fry's, Hewlett-Packard, and Microsoft.

[19] Fry's was the only third party that [20] argued for the two-tiered approach that they are [21] presently asking for today.

[22] Fry's also in its submittal of [23] May the 19th, 2006 suggested alternatives if the [24] Court were not to accept the two-tiered approach.

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[1] And I think it may be important for purposes of [2] this record to read my language with respect to [3] Fry's objections and comments with respect to [4] subparagraph 6c. And that's found at Page 39.

[5] This is a quote. It says, "Fry" — [6] it should read Fry's objects to allowing In-house [7] Litigation Counsel to view its highly [8] confidential sales documents such as [9] industry-wide purchase agreements and sales [10] information. Fry's argues that such information [11] could greatly harm Fry's and the other third [12] parties' ability to negotiate competitive [13] purchase orders and vendor agreements should it [14] be disclosed to the parties to the lawsuit.

[15] Fry's therefore requests that a [16] second "tier" be added to the protective order [17] that would shield "highly confidential" [18] information from disclosure to the parties and [19] their In-house Litigation Counsel.

[20] Fry's offered an alternative. In [21] the alternative, should the Court refuse the [22] request for a two-tiered protective order, Fry's [23] requests that in-house litigation counsel be [24] precluded from viewing confidential documents in

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[1] their normal place of business and that they only [2] be granted access to view the documents at their [3] outside counsel's office.

[4] I'm sure all remember that that [5] recommendation was one that was not adopted in [6] the ultimate report and in the order as signed by [7] Judge Farnan.

[8] Finally, to the extent that this [9] Court allows in-house litigation counsel to view [10] confidential documents produced by third parties, [11] Fry's requests that the in-house litigation [12] counsel's identity be disclosed to the [13] third parties by revising Paragraph 6c to read [14] "To in-house counsel, identify to the opposing [15] party and any producing party".

[16] That language was, in fact, adopted [17] in the report and was ultimately signed by Judge [18] Farnan.

[19] I would also note that with respect [20] to other third parties' comments,

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focusing on [21] issues involving the ban, that there was [22] significant discussion on whether the one year [23] was sufficient. There was also significant [24] discussion with respect to what that ban would

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[1] include. And the Court, at my recommendation, [2] substantially accepted a number of the [3] observations made by Microsoft.

[4] The report and recommendation was [5] entered on the 27th of June of 2006. Subsequent [6] to the entry of that finding and recommendation, [7] there was an opportunity for Fry's and all other [8] parties to file exceptions to the report. [9] Subsequent to that filing of my [10] report, AMD was the only party that filed [11] exceptions to the report. On September the 26th [12] of 2006, Judge Farnan, after discussing AMD's [13] objections, adopted the proposed protective [14] order, and here we are.

[15] So my question, for purposes of that [16] backdrop, is why should the Court permit Fry's or [17] any other party to ask that the protective order [18] be revisited with all that went into the [19] development of that order?

[20] **MR. SMALL:** Good morning, Your [21] Honor. Dan Small for the class plaintiffs.

[22] **SPECIAL MASTER POPPITI:** Sir, do you [23] have a problem?

[24] **MR. STONE:** Oh, was Your Honor's

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[1] question to Fry's or —

[2] **SPECIAL MASTER POPPITI:** No. At [3] this juncture, it is plaintiffs' application.

[4] **MR. STONE:** Okay. I'm sorry.

[5] **MR. SMALL:** Your Honor, I think you [6] put it as well as it could be. The nature of the [7] prior proceedings that this Court has already had [8] on the protective order issues, the very full [9] nature of the proceedings, the very careful [10] consideration that this Court gave to all the [11] objections made by third parties, including [12] certainly Fry's.

[13] And it's also the case, Your Honor, [14] that the specific concerns that Fry's is raising [15] now in connection with its opposition to [16] producing any data in this case are the very [17] concerns that Fry's and others raised the first [18] time around. So it's not a situation, Your [19] Honor, where there was some concern not addressed [20] to the Court that the Court was not aware of. [21] It's not a situation where the circumstances have [22] changed.

[23] In fact, the very data that we seek [24] production of today is the very data that was

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[1] sought by AMD when it served a subpoena on Fry's [2] back in November of 2005, or I think it was [3] October of 2005.

[4] So the circumstances have not [5] changed, Your Honor. And there simply is no [6] reason for the very explanation that Your Honor [7] gave that we should disturb and reopen weeks and [8] weeks of negotiations among the parties and the [9] third parties, as well as very full proceedings [10] that this Court generously gave to all the third [11] parties to participate in the formulation of a [12] protective order that the third parties knew, [13] because they had all been subpoenaed at that [14] point, that they would have to produce under.

[15] There's simply no reason to go back.

[16] **SPECIAL MASTER POPPITI:** Let me ask [17] this question, counsel, because you do this [18] day-to-day every day, and I expect that you have [19] appeared in a number of different courtroom [20] settings.

[21] Are you aware of a process in any [22] other proceeding that you've been involved with [23] where the opportunity to participate literally in [24] the crafting of the initial order was as it was

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[1] constructed in this case?

[2] **MR. SMALL:** Your Honor, in my [3] experience, I have never been involved where the [4] Court proactively invited the third parties to [5] look at a concrete proposal formulated by the [6] parties for a protective order, where they had [7] the opportunity to look at a concrete draft and [8] give written comments as well as to argue as to [9] the propriety of the language. That kind of [10] proceeding I've never seen.

[11] In all candor, I have seen it where [12] the parties have agreed to or the Court has [13] entered a protective order and then subsequently [14] a third party who has been asked to produce has [15] objected to a particular provision. But never [16] has the third party had the opportunity before [17] the order was entered to object.

[18] **SPECIAL MASTER POPPITI:** I'm aware [19] of that practice, if you will, and I'm aware of [20] the case law that was cited or discussed by [21] Fry's.

[22] **MR. SMALL:** Yes. Those are all the [23] comments I have at this point on the protective [24] order issue.

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[1] Your Honor, would you prefer to hear [2] from Fry's?

[3] **SPECIAL MASTER POPPITI:** I would [4] prefer to hear that issue first, please.

[5] **MR. STONE:** Thank you, Your Honor. [6] Respectfully, it's Fry's position that things [7] have changed actually since the time that Fry's [8] submitted some comments with respect to the [9] protective order that was ultimately entered in [10] this case.

[11] As you noted, Fry's comments and [12] objections to the proposed protective order were [13] submitted on May 19, 2006. That was more than a [14] month prior to the June 22, 2006 subpoena from [15] class plaintiffs.

[16] When class plaintiffs subpoenaed [17] Fry's, that changed the landscape with respect to [18] both the information being sought from Fry's and [19] the potential for harm that could come to Fry's [20] if its confidential and highly proprietary trade [21] secret information is produced in this case. And [22] I think that the documents before Your Honor [23] demonstrate that it's undisputed that what we're [24] talking about here are highly proprietary trade

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[1] secret materials of Fry's, materials that provide [2] Fry's with its competitive advantage in the [3] marketplace.

[4] **SPECIAL MASTER POPPITI:** I don't [5] think there's any dispute with respect to that, [6] is there, Mr. Small?

[7] **MR. SMALL:** There's a partial [8] dispute, Your Honor.

[9] **SPECIAL MASTER POPPITI:** Okay. I'll [10] let you develop it at some point.

[11] **MR. STONE:** Also mentioned, Your [12] Honor, a June 12, 2006 hearing which Fry's did [13] not participate in. At that point in time, again [14] that was prior to the time that the subpoena that [15] is currently before the Court issued to Fry's. [16] And it wasn't until December of 2006 when class [17] plaintiffs began a meet and confer process with [18] Fry's that led to where we are today.

[19] And it was through those discussions [20] with counsel for class plaintiffs and the [21] recognition that AMD and Intel would not be [22] seeking this transactional data, at least as of [23] now, but are not participating in this motion to [24] compel, that it became apparent to Fry's that a

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[1] modification to the protective order was [2] something that they were interested in trying to [3] obtain, given the nature of the materials being [4] sought by class plaintiffs.

[5] **SPECIAL MASTER POPPITI:** So is [6] counsel suggesting that notwithstanding the [7] whereas clauses in the protective order, that I [8] would submit to you contemplates access to [9] transactional data, that notwithstanding that or [10]

access to highly confidential information as [11] sensitive and as important as the information [12] that you have described, notwithstanding that, [13] Fry's had no expectation as a third party in this [14] case that the transactional data would not be the [15] subject of third-party subpoena practice?

[16] **MR. STONE:** I think the question [17] that precisely what transactional data was going [18] to be sought. And I think as Your Honor can see [19] from the back and forth between the parties, that [20] that's been somewhat of a moving target. [21] I think that at the time that Your [22] Honor previously considered Fry's objections, the [23] issue wasn't quite ripe. It hadn't been framed [24] as a result of the ongoing discussions that have

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[1] taken place between and among the parties.

[2] And so even though in the abstract [3] one could talk about what materials might [4] ultimately be sought, now Your Honor has a fuller [5] record, including declarations from Fry's [6] specifically identifying the trade secret and [7] confidential nature of the materials. And as a [8] result, the Court is in a better position to [9] consider Fry's request.

[10] **SPECIAL MASTER POPPITI:** Just give [11] me one moment.

[12] (Following a discussion held off the [13] record.)

[14] **SPECIAL MASTER POPPITI:** I think [15] what I'm hearing you say is that notwithstanding [16] the fact that AMD had already issued the [17] subpoena, and I can tell you I haven't studied [18] that, that that would not have put you on notice [19] that transactional data was expected to be an [20] object of discovery in this case and perhaps [21] ultimately be involved in ultimate proofs in this [22] case.

[23] **MR. STONE:** There was the potential [24] that they were going to seek such data. Given

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[1] their current posture, and Intel's current [2] posture not participating in this motion, and [3] those two parties dropping out, and the fact that [4] what they sought was slightly different from what [5] class plaintiffs seek. I don't think that Fry's [6] was on notice with respect to the precise [7] information that we're now discussing.

[8] In addition, it was a different [9] landscape when Your Honor was considering a [10] subpoena from AMD and/or Intel whereas now there [11] are tens and tens of law firms representing class [12] plaintiffs that want to have access to Fry's [13] data.

[14] **SPECIAL MASTER POPPITI:** Just give [15] me one moment, please, counsel, if you will.

[16] **Mr. Small,** do you have a copy of the [17] AMD —

[18] **MR. SMALL:** Yes, Your Honor.

[19] **SPECIAL MASTER POPPITI:** — subpoena?

[20] **MR. SMALL:** Would you like me to [21] bring it up?

[22] **SPECIAL MASTER POPPITI:** Please.

[23] Let's do this: I know it is [24] certainly part of the Court's record. Do you all

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[1] have your copy or a copy with you?

[2] You do not? [3] How many copies will we need? Do [4] you want three? Four?

[5] **MR. STONE:** I think three will be [6] helpful.

[7] **SPECIAL MASTER POPPITI:** Three?

[8] (Following a discussion held off the [9] record.)

[10] **MR. SMALL:** Your Honor.

[11] **SPECIAL MASTER POPPITI:** Yeah, [12] please.

[13] **MR. SMALL:** I would note for [14] everyone's convenience that the AMD subpoena was [15] attached to the Volin declaration, which was [16] submitted with our reply papers as Exhibit F.

[17] **SPECIAL MASTER POPPITI:** Thank you. [18] That's not in your — that's not [19] Exhibit F of your application; correct, counsel?

[20] **MR. SMALL:** Right. It was attached [21] to the Volin declaration, which was with the [22] reply.

[23] **SPECIAL MASTER POPPITI:** Right. [24] Right.

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[1] **MR. SMALL:** Your Honor.

[2] **SPECIAL MASTER POPPITI:** Yes.

[3] **MR. SMALL:** I apologize to the [4] Court. I was just advised that the subpoena that [5] I gave you was the Intel subpoena, not the AMD [6] subpoena.

[7] **SPECIAL MASTER POPPITI:** Yeah. I [8] didn't think I saw an AMD subpoena.

[9] **MR. SMALL:** Yeah.

[10] **SPECIAL MASTER POPPITI:** I'm kind of [11] happy that I didn't, because —

[12] **MR. VOLIN:** Your Honor, I apologize. [13] Richard Volin.

[14] The Exhibit F is the AMD subpoena, [15] but what was handed up was Exhibit D, which was [16] the Intel subpoena.

[17] **SPECIAL MASTER POPPITI:** I didn't [18] remember — just a second.

[19] I have it now. I have it. [20] Please. Mr. Small, you have — I'm [21] going to direct my attention to that document for [22] a

minute. You can do it from the table.

[23] **MR. STONE:** Thank you.

[24] **MR. SMALL:** Your Honor, the specific

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[1] part of the AMD subpoena that addresses the data [2] of Fry's is Request Number 11, all four subparts, [3] but of most interest are subparts c and which is [4] listed under the heading Purchase History.

[5] **SPECIAL MASTER POPPITI:** Does [6] counsel have that?

[7] **MR. STONE:** I do now, Your Honor.

[8] **SPECIAL MASTER POPPITI:** Please.

[9] **MR. STONE:** And the point I'd make, [10] Your Honor, is that the level of detail sought [11] there is vastly different than the level of [12] detail currently being sought by class [13] plaintiffs. Circumstances change in discovery [14] and —

[15] **SPECIAL MASTER POPPITI:** I [16] understand that.

[17] **MR. STONE:** — that's why we're here [18] on a more fuller — on a more full record [19] requesting modification of the protective order.

[20] **SPECIAL MASTER POPPITI:** And why [21] does the existing protective order not give you [22] protection and the expectation that if there is a [23] violation of the order, a Court standing behind [24] the order of protection?

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[1] **MR. STONE:** Well, what I'd say, Your [2] Honor, is that you can't unring the bell. Once [3] the information is out there, and with the vastly [4] greater number of lawyers, and law firms, and [5] parties involved now, the possibility of the [6] information being disclosed, even inadvertently, [7] is much greater.

[8] And so the safeguards that Fry's has [9] requested are common and have been issued on [10] numerous occasions by Judge Farnan.

[11] **SPECIAL MASTER POPPITI:** I'm aware [12] of this.

[13] **MR. STONE:** And so we think that [14] would help prevent the possibility of any harm [15] befalling for us.

[16] **SPECIAL MASTER POPPITI:** Thank you, [17] sir.

[18] **MR. STONE:** Thank you.

[19] **SPECIAL MASTER POPPITI:** Mr. Small.

[20] **MS. GRAHAM:** Your Honor.

[21] **SPECIAL MASTER POPPITI:** Yes, [22] please.

[23] **MS. GRAHAM:** I assume you would [24] prefer to hear from just one counsel for each

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[1] party, but if I might impose upon the Court. You [2] had asked a question if counsel was aware of an [3] instance where, under circumstances as here, a [4] protective order had been negotiated with third [5] parties, and then subsequently a third party came [6] in and wanted different provisions.

[7] And I'm not aware of something that [8] satisfies that, but I am aware of a case, an [9] antitrust case here that was being handled by [10] Judge Jordan, and we represent the defendant as [11] does Mr. Cottrell. It's the Tricor litigation [12] against Abbott and Fournier.

[13] And in that case, a protective order [14] had been negotiated at the outset. I don't [15] recall that the Court needed to rule on anything [16] in the case, but it was negotiated. And Abbott's [17] in-house counsel was covered under the protective [18] order to see all information.

[19] This I know, because Abbott is my [20] client. It's a very important provision to that [21] client.

[22] Subsequently, this past fall, the [23] defendants were seeking certain information from [24] Impax, one of the plaintiffs that's a generic

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[1] pharmaceutical company, and it protested that [2] this information was highly confidential. It was [3] related, I believe, to business-type planning [4] information and financial information, and they [5] took the position that, notwithstanding the [6] protective order, that in-house counsel should [7] not be allowed to see that information. And over [8] the objections of Abbott to modify the protective [9] order, in fact, Judge Jordan said that that [10] information would be produced and not given to [11] in-house counsel.

[12] So we at least have that precedent [13] that where specific information came along later, [14] and certainly this kind of information was in [15] general information that was fully expected to be [16] produced in the case. But notwithstanding that, [17] Judge Jordan took — he held that given the [18] special — how proprietary this information was [19] and was one category of information, that he [20] would modify the protective order to the extent [21] that that information would not go to in-house [22] counsel.

[23] **SPECIAL MASTER POPPITI:** And did I [24] understand your comments to be that the third

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[1] parties participated in the negotiation of the [2] original order?

[3] **MS. GRAHAM:** That order didn't [4] involve third parties, so I was trying to

make [5] clear that third parties weren't involved there. [6] But that was — Impax is actually a party in that [7] case.

[8] So I would submit that if a party to [9] a case, who certainly is fully engaged in the [10] case or controversy, is negotiating a protective [11] order at the outset and submits it to the Court [12] for entry and later comes along to modify it, and [13] the Court would agree to do it, that the case [14] ought to be stronger in this instance.

[15] **SPECIAL MASTER POPPITI:** What [16] standard did the Court use?

[17] **MS. GRAHAM:** I'm not sure that he [18] articulated a standard, but we could certainly [19] get you the transcript, if that would be helpful.

[20] **SPECIAL MASTER POPPITI:** Yeah.

[21] There was no written decision; it was in the [22] transcript?

[23] **MS. GRAHAM:** I believe it was just a [24] transcript decision, although there probably was

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[1] a written order that issued.

[2] **SPECIAL MASTER POPPITI:** I'd like to [3] be supplied with the transcript, please.

[4] **MS. GRAHAM:** Okay. We'll do that.

[5] **SPECIAL MASTER POPPITI:** Mr. Small.

[6] **MR. SMALL:** Thank you, Your Honor.

[7] A few things. If the Court were to [8] compare the document request made by AMD in its [9] 2005 subpoena with the document request made in [10] class plaintiffs' subpoena with respect to data, [11] you would see that they're strikingly similar.

[12] Both ask for data on a monthly basis [13] broken down in certain ways. Both for Fry's [14] purchases of computer systems and for Fry's sales [15] of those same computer systems.

[16] So there really is no basis, Your [17] Honor, based on differences, very slight between [18] the AMD and the class plaintiffs subpoenas, for [19] Fry's to argue that it was not fully aware that [20] it would have to produce data exactly of the type [21] we're talking about today.

[22] The only evolution there is, Your [23] Honor, in the negotiations with respect to Fry's [24] data is that the parties have moved from

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[1] requesting data on a monthly basis to requesting [2] it on a transactional basis. And the reason for [3] that, Your Honor, is it's preferable for the [4] parties to get it transactionally. And we also [5] believe it's less burdensome for the producing [6] party to give it that way if it maintains it on a [7] transactional basis in the ordinary

course of [8] business.

[9] Now, Fry's has represented to us [10] that it does not keep its data on a monthly [11] basis. So when Fry's saw the request for [12] documents sufficient to show their sales and [13] their purchases on a monthly basis, it knew that [14] that would require it to produce it [15] transactionally or to aggregate it for us.

[16] And presumably, since it says it [17] doesn't want to undergo the burden of aggregating [18] by month, that it understood that that meant a [19] transactional production.

[20] **SPECIAL MASTER POPPITI:** Okay.

[21] **MR. SMALL:** A couple other points, [22] Your Honor.

[23] **SPECIAL MASTER POPPITI:** On this [24] issue?

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[1] **MR. SMALL:** Well, yes. [2] Let me say, too, that when Fry's [3] submitted its objection to the original proposed [4] protective order, that it understood exactly the [5] type of information that it would be asked to be [6] produced in this case. If you look at objection [7] number two, it says, in part, plaintiffs have [8] subpoenaed highly confidential sales documents [9] such as industry-wide purchase agreements and [10] sales information. If that doesn't encompass [11] sales data, I'm not sure what does.

[12] So clearly, Fry's anticipated this [13] kind of production of data. But Your Honor, it's [14] not just what Fry's anticipated, it's also what [15] the Court anticipated.

[16] And there's no doubt that Your Honor [17] and Judge Farnan in dealing with the [18] confidentiality order in this case understood and [19] anticipated that there would be production in [20] this case of highly confidential materials, [21] including the very types of materials that are at [22] issue here.

[23] In the protective order itself, it [24] lists the type of documents that can be

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[1] designated confidential. Those documents include [2] "non-public pricing information, non-public data [3] concerning sales, revenues, profits, margins and [4] variants, non-public customer lists, non-public [5] data concerning costs."

[6] So the Court was very aware that the [7] data would be included in those categories of [8] documents and in determining that the protections [9] that the order provided were sufficient for [10] documents of that type.

[11] The other point, Your Honor, is that [12] the Court understood very well that there was [13] going to be production of

data or other types of [14] documents that were very sensitive competitively. [15] As Your Honor mentioned, I believe there is a [16] specific whereas clause in the order that says [17] "preparation for trial may require the discovery [18] and use of documents and other information which [19] constitute or contain commercial trade secrets".

[20] The very type of information that [21] Fry's is saying its data is and therefore needs [22] to be protected. So there was no doubt in the [23] Court's mind when it entered this order that [24] there would be trade secrets produced in this

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[1] case. And there's no doubt that the Court [2] determined that the protections afforded by the [3] existing protective order were sufficient to [4] handle production of trade secrets.

[5] And the Court even goes on in the [6] protective order to say —

[7] **SPECIAL MASTER POPPITI:** What page?

[8] **MR. SMALL:** — that the disclosure of [9] trade secrets would be competitively harmful to [10] the producing party. So all the harm that Fry's [11] talks about, the Court was aware of and [12] considered and found that the protective order [13] was sufficient to handle it.

[14] Last point, Your Honor. There's [15] always going to be a third party out there that [16] would prefer more protection from the protective [17] order. In fact, Your Honor heard many of them [18] come forward already in connection with the [19] original proceedings on the protective order [20] asking for more than they got.

[21] If Fry's, who is producing data [22] really no different from data being produced by [23] many other third parties in this case, were to [24] get a change of the protective order, then I

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[1] believe, Your Honor, that would open the flood [2] gates to other third parties producing exactly [3] the same kind of data asking for their [4] modifications to the protective order with really [5] no end in sight.

[6] And that was the whole purpose, Your [7] Honor, of the prior proceedings was to let [8] everyone come forward at once, put all their [9] objections out, argue them, and let the Court [10] make a decision about what the right protective [11] order was.

[12] Finally, you know, this notion that [13] Intel and AMD are dropping out is not the case, [14] Your Honor. Those parties can speak for [15] themselves. They're here today.

[16] But my understanding is that they [17]

have not withdrawn their subpoenas, and they [18] still seek production of Fry's data. And, in [19] fact, they seek the very data that we do, which [20] is transactional sales and purchase records of [21] Fry's.

[22] Thank you, Your Honor.

[23] **SPECIAL MASTER POPPITI:** Counsel, [24] please.

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[1] **MR. STONE:** A few comments, Your [2] Honor.

[3] First, with respect to the AMD [4] subpoena, I would submit that there are actually [5] far more differences than there are similarities. [6] And in particular, it's the type of information [7] that's being sought by the subpoena where the [8] differences are found.

[9] The AMD subpoena in points 11c and [10] 11d doesn't seek the information which is [11] particularly at issue here today, which is the [12] revenue information, the pricing information, the [13] cost information that is at the heart of Fry's [14] business, and if disclosed would cause the most [15] harm to Fry's.

[16] Beyond that, Your Honor, the reason [17] why — one reason why we argue that we need [18] additional protections under the protective order [19] is that what class plaintiffs intends to do [20] apparently is to push the burden on monitoring [21] this case to a non-party, Fry's, to make sure [22] that every submission in the case doesn't include [23] Fry's confidential information.

[24] By having some additional

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[1] protections, Fry's hopes that ultimately the [2] information would not be used either [3] inadvertently or intentionally in a harmful [4] manner.

[5] And I think that's all I have, Your [6] Honor, unless you have any further questions?

[7] **SPECIAL MASTER POPPITI:** No. Thank [8] you.

[9] Mr. Small, what I would like you to [10] do, if you're prepared to do it at this point, [11] with respect to documents that have been produced [12] by other third parties, what have you done to [13] protect the safeguards of those interests of [14] those third parties?

[15] **MR. SMALL:** Your Honor, this is Dan [16] Small for the class plaintiffs.

[17] We, of course, have read the [18] protective order that the Court has entered. We [19] are fully prepared and have fully abided by all [20] of the provisions of that protective order.

[21] The experts, whether they be [22] testifying or non-testifying experts that we [23] retain, have all been provided a

copy of the [24] protective order and have been asked to and have

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[1] signed the acknowledgement that they have read, [2] understood and will abide by the protective [3] order.

[4] There are additional procedures that [5] have been set up with respect to the review of [6] electronic data that has been produced in this [7] case which provide additional protections [8] actually beyond what is provided by the [9] protective order. So really we've done [10] everything.

[11] **SPECIAL MASTER POPPITI:** Would you [12] describe some of those? Because there is some [13] language in the order that I certainly can [14] reference if it's important to do that. There is [15] an expectation that there would have been [16] procedures established if electronic data was [17] being reviewed by in-house counsel at their [18] office.

[19] **MR. SMALL:** Yes. I'll have to [20] confess, Your Honor, I'm not as familiar maybe as [21] some others here with the provisions of the [22] E-discovery stipulation and order.

[23] But essentially my understanding is [24] that when native productions are made of

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[1] electronic documents, that the location of the [2] review has to be a secure facility. And that [3] there have to be other appropriate protections to [4] make sure that the native documents are not [5] improperly disseminated or are not reviewed [6] improperly by those who are not permitted access [7] to them.

[8] **SPECIAL MASTER POPPITI:** Thank you.

[9] **MR. SMALL:** Sure.

[10] **SPECIAL MASTER POPPITI:** Any other [11] comments?

[12] **MR. STONE:** If I could briefly be [13] heard, Your Honor?

[14] **SPECIAL MASTER POPPITI:** Please.

[15] **MR. STONE:** Counsel for class [16] plaintiffs makes note that there are experts in [17] this case. And now given the number of law firms [18] representing class plaintiffs, there are many, [19] many experts.

[20] And so one additional protection [21] that Fry's had requested is having some knowledge [22] concerning the nature of those experts. Fry's [23] does not want to have its highly confidential [24] information, its trade secret information to make

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[1] its way into the hands of an expert who's working [2] for one of Fry's direct

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competitors. And to [3] avoid such an occurrence, in many cases, courts [4] impose some notice requirement that would then [5] give Fry's an opportunity to object.

[6] And given the current state of the [7] protective order, that does not exist. When [8] Fry's was dealing with AMD and Intel, two [9] parties, the number of experts at issue and [10] potentially in play was fairly small.

[11] Now, that number has expanded [12] exponentially and so Fry's submits that that is [13] further grounds for a modification of the [14] protective order at this time.

[15] **SPECIAL MASTER POPPITI:** Thank you.

[16] **MR. STONE:** I'll also note that it [17] seems that some parties have been satisfied by [18] the protective order. Fry's is not.

[19] But to the extent that a number of [20] them are, then it's not likely that many parties [21] will be coming back to seek modifications.

[22] **SPECIAL MASTER POPPITI:** Thank you. [23] Just give me one moment, please.

[24] I just want to take ten minutes to

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[1] look at something in the transcript to the [2] hearing and then we'll reconvene. Let's [3] reconvene by that clock at ten after, please.

[4] **MR. STONE:** Okay.

[5] (A brief recess was taken.)

[6] **SPECIAL MASTER POPPITI:** I just need [7] a few more minutes.

[8] (Following a discussion held off the [9] record.)

[10] **SPECIAL MASTER POPPITI:** Let me just [11] focus on one issue for the moment. I do want the [12] opportunity to review Judge Jordan's transcript, [13] and without sounding unreasonable, because I [14] don't want to sound unreasonable, if I can have [15] that — is close of business today doable?

[16] **MS. GRAHAM:** That's fine. We can do [17] that.

[18] **SPECIAL MASTER POPPITI:** Okay.

[19] Great.

[20] There was some reference to a need, [21] if you will, to also look at the protective order [22] insofar as utilization of confidential material [23] by — highly confidential is the way you look at [24] it as far — insofar as experts are concerned.

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[1] And I think it's fair to suggest [2] that if you look at Page 81 of my report dealing [3] with Paragraphs 6b and 11, you will

see the [4] result of the dispute as between a number of [5] third parties and what the parties wanted in the [6] case. And the dispute was framed in virtually [7] the same language that counsel framed it just a [8] short while ago.

[9] I'm looking at Page 88 of the June [10] 12th, 2006 transcript. This is Mr. Holston [11] speaking. It's H-O-L-S-T-O-N. Excuse me.

[12] This is a quote. "This relates to [13] the parties' experts and consultants." And by [14] "this relates", he's talking about Paragraph 6 — [15] 6b. "The third — the non-parties have requested [16] that they be given, in fact, who the parties are [17] intending to use as their experts and their [18] consultants in this litigation.

[19] And Your Honor, although it may not [20] be clear, let me make it clear. Obviously, [21] non-parties would be willing to be bound by [22] appropriate confidentiality around that [23] information. We don't have a dog in the fight, [24] Your Honor, but we do — it is a small world.

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[1] The technology world is small and [2] getting smaller every day. And who the parties [3] are selecting, and my guess is there's going to [4] be quite a number of experts and consultants in [5] this case, and who they're using may very well be [6] relevant to the non-parties in the context of the [7] ordinary course of their business.

[8] And in the nature of the information [9] that's going to be provided to these individuals, [10] Your Honor, we don't think this is an [11] unreasonable protection. And to take a page out [12] of AMD's book, the only concern here would be if [13] the Court were to conclude that the counsel and [14] the non-parties could get access on this [15] information and would misuse it.

[16] And, otherwise, Your Honor, there is [17] clearly a legitimate business interest for the [18] non-parties to know who's getting access to their [19] incredibly sensitive information. AMD, in [20] essence, recognizes that they are going to tell [21] us who the in-house lawyers are. [22] We think we ought to be told who the [23] experts are as well."

[24] Now, what resulted from that

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[1] discussion — let me just read the section of the [2] report. This is a quote from Page 81 into 82.

[3] The parties argued against the [4] change sought by the third parties "simply [5] because there's going to be a lot of experts, a [6] lot of consultants. Many of them are [7] non-testimonial. And both Intel and AMD view [8] that as work product and that we wouldn't, in the [9]

ordinary course, be disclosing to anyone — [10] anybody, nor would we have any obligation to do [11] so."

[12] "The parties, however, went on to [13] offer that they would be willing to accommodate [14] the third parties' concerns in the spirit of [15] compromise and agreed to work with the third [16] parties to come up with mutually acceptable [17] language."

[18] "Following the hearing, by [19] submission dated June 15th, 2006, the parties [20] agreed to revise the concluding paragraph, [21] Paragraph 11 to add the following language." And [22] then it goes on to quote the language.

[23] With that, I will suggest for the [24] record that I am not inclined to propose a change

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[1] to the protective order. At the same time, I [2] want to give counsel the opportunity to provide [3] me with the transcript from the case that you [4] referenced with Judge Jordan, so I can examine [5] that.

[6] If you think that the papers filed [7] in conjunction with that would be helpful, then [8] I'll leave it to your discretion as to whether or [9] not you want to file those papers with the [10] transcript.

[11] I don't know that there would be a [12] need, but if you want the need, you want to have [13] the opportunity to make comments on those, I'll [14] entertain that.

[15] And we should discuss that now, [16] because I realize that all time frames in going [17] forward are rather tight. So if I can have the [18] transcript and anything else that you'd like [19] to — I said tonight, but that may mean you want [20] to file something along with it.

[21] Why don't you propose a time frame, [22] please.

[23] **MR. STONE:** Could we do it by close [24] of business tomorrow, Your Honor?

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[1] **SPECIAL MASTER POPPITI:** Yes.

[2] **MR. STONE:** That would give us [3] adequate time.

[4] **SPECIAL MASTER POPPITI:** Yes.

[5] **MR. SMALL:** My suggestion, Your [6] Honor, would be for Fry's to simply identify any [7] portions of the transcript that they believe are [8] relevant. If they would limit their comments to [9] that, we would not have anything that we would [10] need to respond to.

[11] **SPECIAL MASTER POPPITI:** Do you want [12] to limit yourself at this point or do you want to [13] make some judgment as to whether you want to file [14] something in addition to the transcript?

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[15] MR. STONE: I think we'd like to [16] reserve our right to —

[17] SPECIAL MASTER POPPITI: Okay.

[18] MR. STONE: — file something along [19] with the transcript, Your Honor.

[20] SPECIAL MASTER POPPITI: And if that [21] is done by close of business tomorrow, how long [22] would you like to have to weigh in?

[23] MR. SMALL: Two days, Your Honor, [24] please.

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[1] SPECIAL MASTER POPPITI: Okay.

[2] MR. SMALL: Thank you.

[3] SPECIAL MASTER POPPITI: Would [4] someone suggest a page limit, please, so we don't [5] wind up having submittals in the submittals?

[6] MR. STONE: I think three pages [7] would be sufficient.

[8] MR. SMALL: That would do for us as [9] well.

[10] SPECIAL MASTER POPPITI: Three pages [11] is fine. Okay.

[12] Let me just clear some of this stuff [13] up, please. Well, I guess that concludes my [14] opening comments. Didn't expect it to take this [15] long, but I think it was productive for purposes [16] of the record.

[17] Counsel, please.

[18] MR. SMALL: Thank you, Your Honor. [19] Dan Small for the class plaintiffs.

[20] SPECIAL MASTER POPPITI: Please.

[21] MR. SMALL: I want to start actually [22] by clarifying something I told the Court before [23] relating to the E-discovery stipulation. Based [24] on my conversations with colleagues during the

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[1] break, it's not clear to me that the E-discovery [2] stipulation applies to data production. And it's [3] also not clear to me that it applies to [4] third-party production.

[5] So I don't want to represent to the [6] Court that that's necessarily an additional [7] protection that would apply to Fry's today.

[8] SPECIAL MASTER POPPITI: Okay. [9] Thank you.

[10] MR. SMALL: Your Honor, the class [11] plaintiffs and the class that they seek to [12] represent are end users of the x86 microprocessor [13] that Intel manufactures. The class or the [14] proposed class purchases primarily computer [15] systems that contain Intel's microprocessor [16] chips.

[17] And we are at the end of the line of [18] distribution. We are the ones who buy for our [19] own use and not for resale.

[20] What that means for this case, Your [21] Honor, is that to prove our damages claim, it's [22] not sufficient for us just to prove, of course, [23] that Intel unlawfully monopolized the x86 market, [24] nor is it even sufficient to show that as a

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[1] result of that unlawful monopolization, Intel [2] charged inflated prices to its customers.

[3] In addition, because we stand at the [4] end of the distribution chain, we need to prove [5] that any overcharge that Intel imposed on its [6] customers was passed on down the line of [7] distribution to the end users, our proposed class [8] members.

[9] Therefore, Your Honor, we need [10] transactional data in this case, including Fry's [11] transactional data, to be able to show that [12] inflated prices paid by intermediaries in the [13] distribution chain led to higher prices those [14] intermediaries charged to the end users.

[15] That's the pass-on analysis. It [16] requires data, both as to the prices paid by [17] intermediaries and the prices charged by [18] intermediaries. That's precisely the type of [19] data that we're looking for in this case.

[20] That data is also relevant to class [21] certification, because it's often the case that a [22] defendant will oppose class certification on the [23] argument that you cannot use a class-wide [24] generalized damages formula to show impact and

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[1] damages to all segments of the market, that you [2] need to individually look at different types of [3] end users, depending on which channel of [4] distribution they purchased in to see whether [5] they were injured.

[6] SPECIAL MASTER POPPITI: Okay. And [7] if I understand the law on that issue, it is [8] something that is not settled in this case yet, [9] and counsel has not chosen to take the [10] opportunity to ask me to look at what the law [11] would be on class certification; correct?

[12] MR. SMALL: That's correct, Your [13] Honor. And I think it fits sort of into the [14] category that Your Honor pointed out before when [15] we were seeking to compel Intel to produce the [16] foreign document discovery, raising, you know, [17] issues under the FTAIA about whether we were [18] entitled to that discovery, you know, based [19] really on issues that were raised by the motion [20] to dismiss that Intel file.

[21] And Your Honor correctly pointed out [22] that those are, you know, merit issues that the [23] Court will get to in connection with the motion [24] to dis-

miss. Here, you know, ultimately the Court

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[1] will have to decide on plaintiffs' class [2] certification motion, what the law is, what the [3] standard is, what showing we have to make.

[4] Our point for now is because that [5] has not been ruled on by the Court, we need to be [6] able to get discovery now that will allow us to [7] handle the arguments that Intel may well make in [8] this case. And we certainly would not be [9] surprised to see Intel argue you have to show [10] that there is a generalized damages formula that [11] shows that Fry's customers, no differently from [12] customers of other retailers, are impacted by the [13] unlawful conduct, and that you have a formula [14] that can show the damages for all segments of the [15] market through a single formula.

[16] So that may well be the proof that [17] Intel tries to put us to.

[18] SPECIAL MASTER POPPITI: And I [19] expect that Intel is not going to take the [20] opportunity today to announce what position it is [21] going to take.

[22] MR. SMALL: I believe that's [23] correct, Your Honor. And I want to hasten to add [24] that we don't necessarily agree with how Intel

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[1] may argue class certification, but it is still [2] incumbent upon us as representatives of a [3] proposed class to accumulate all of the evidence [4] that we think would be important to handling [5] arguments that may well be made by Intel.

[6] So Your Honor, those are the reasons [7] that we need this data. And in particular, Fry's [8] data.

[9] We very carefully, at the outset of [10] the case, sat down with our economist and said, [11] We know we have to prove pass on here. What is [12] the sample that we need from intermediaries in [13] the distribution chain to be able to prove pass [14] on to the class?

[15] We understood that we could not [16] subpoena every single reseller in the country who [17] sells a computer with an Intel chip in it. It's [18] just not possible or practical.

[19] So we had to make judgments about [20] what would be an appropriate representative [21] sample of resellers. Now, we picked Fry's [22] because Fry's is actually different from many [23] retailers.

[24] Certainly different from Best Buy

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[1] and Circuit City in the sense that Fry's is a [2] computer super store. They have

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huge retail [3] outlets that carry a very complete line of [4] computers, many more models than typically would [5] be carried by a Circuit City or a Best Buy.

[6] In fact, in its papers, Fry's points [7] out that since 2000 it has sold over 2000 [8] different computer models. And unlike many other [9] computer retailers or electronic stores that [10] include computers in their line of products, [11] Fry's also sells computer components.

[12] It's a store that the proverbial [13] computer geeks like to go to because they can [14] pick out each of the different components of a [15] computer and actually assemble their own [16] computers. And so Fry's is its own kind of [17] retailer that we would like to see data from to [18] be able to see how the prices and what the [19] pricing strategy is to assure ourselves that we [20] can show with the single formula that Fry's [21] customers are injured no less than other [22] customers in the market.

[23] The other thing, Fry's has a [24] reputation and a practice of being an aggressive

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[1] pricer in the market. It offers, you know, [2] especially it appears on a sort of lost leader [3] basis, very low prices for computer systems. So [4] we need to be able to see whether there is any [5] issues there that have implications for a class [6] certification or proof of pass on.

[7] And it's also a very large retailer. [8] By our count, it has 33 stores in nine different [9] states. So they sell a lot of computers, as they [10] made clear in the papers that they submitted on [11] this motion.

[12] I would also finally point out that [13] really none of this is challenged by Fry's. They [14] claim that we didn't explain relevance [15] sufficiently or we haven't shown, you know, [16] enough relevance in light of their reasons for [17] not wanting to produce.

[18] But the essence of our explanation [19] for why these data are relevant and needed by the [20] plaintiffs, they have really not challenged.

[21] **SPECIAL MASTER POPPITI:** I think [22] Fry's position is that you haven't stepped up to [23] what they see to be a more significant burden [24] when you're looking for this information from

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[1] third parties.

[2] Would you speak to that, please?

[3] **MR. SMALL:** Yes. First of all, for [4] all the reasons I just articulated, Your Honor, [5] this was not a casual request on the class [6] plaintiffs' part for this data. This was part of [7] a very carefully crafted sampling of resellers [8] that, with the

assistance of our economist, we [9] put in place to get the collection of data we [10] believe we need to show pass on in this case.

[11] And the notion that we need to prove [12] pass on is not disputed, nor could it be. And [13] the notion that the right way or the right [14] collection of evidence to prove pass on is [15] purchase information and resale information by [16] the intermediaries is not disputed, nor could it [17] be. So that's why we need this information.

[18] And I would submit, while certainly [19] Fry's can make arguments that that need is [20] outweighed by certain other factors, we think, [21] first of all, that the need is great. So it [22] would take very compelling other factors to [23] outweigh it.

[24] And second, when you look closely at

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[1] what the other factors are that Fry's points to, [2] they are not substantial.

[3] And if I may, Your Honor, I'd like [4] to go through those.

[5] **SPECIAL MASTER POPPITI:** Please.

[6] **MR. SMALL:** First, Fry's argues, [7] well, you might need the data at some point, but [8] you certainly don't need it now. And for the [9] reasons I just gave, Your Honor, we certainly do [10] need it now for class certification purposes.

[11] This is an issue that is going to [12] come up, we believe, on class certification, and [13] the data is directly relevant to the issue of [14] whether we can have a generalized damages [15] formula.

[16] Second —

[17] **SPECIAL MASTER POPPITI:** Let me just [18] ask a question. It really is more out of [19] curiosity than of substance, but when the [20] original scheduling order was discussed with [21] Judge Farnan, was there any discussion of phase [22] discovery? That is, discovery for class [23] certification purposes and then discovery for [24] merits?

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[1] **MR. SMALL:** Not to my knowledge, [2] Your Honor.

[3] And I believe the reason for that is [4] because, of course, the class plaintiffs are not [5] the only plaintiffs in this case.

[6] **SPECIAL MASTER POPPITI:** Right.

[7] **MR. SMALL:** There is also AMD, which [8] of course doesn't have to face any class [9] certification issues. So AMD, which had filed [10] the case first, had served subpoenas on third [11] parties I think way back in 2005.

[12] It was anxious, as it should be, to [13] proceed in discovery, and certainly

would not [14] want to have to be bifurcated where it dealt just [15] with class certification issues, which it didn't [16] have, and had to wait further to get to the [17] merits.

[18] So AMD sort of led the charge in [19] moving into merits, and we followed along.

[20] **SPECIAL MASTER POPPITI:** And [21] notwithstanding that, it's my understanding, I [22] think, based on your submittals that you have [23] either agreed or you would agree that you will [24] accept, if you will, discovery that is more

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[1] focused for purposes of class certification. And [2] then once that is accomplished, you expect full [3] discovery without explaining any time lines; is [4] that fair or am I —

[5] **MR. SMALL:** I would say it's correct [6] to this extent, Your Honor, that the class [7] plaintiffs have focused their efforts on getting [8] production of transactional data.

[9] **SPECIAL MASTER POPPITI:** Right.

[10] **MR. SMALL:** Because that is a key [11] portion of the evidence that we need for class [12] certification purposes. But it's certainly our [13] hope that the production we get now will be the [14] production for the case, that the same data that [15] we get now will be used also for merits.

[16] **SPECIAL MASTER POPPITI:** Okay.

[17] **MR. SMALL:** Now, I will mention that [18] we offered in our papers to accept a sample from [19] Fry's of its data for class certification [20] purposes as long as Fry's would agree for merits [21] to make a full production of its data later.

[22] We don't know what Fry's position is [23] on that, but that is something we're willing to [24] discuss with Fry's.

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[1] **SPECIAL MASTER POPPITI:** Yeah. Let [2] me just make sure of that, because if you would [3] turn your attention just briefly to Page 3 of [4] your reply.

[5] **MR. SMALL:** Mm-hmm.

[6] **SPECIAL MASTER POPPITI:** Do you have [7] that in front of you?

[8] **MR. SMALL:** Yes, Your Honor.

[9] **SPECIAL MASTER POPPITI:** You [10] indicate at five, class plaintiffs are amenable [11] to receiving such a sample for class [12] certification purposes, but Fry's would then need [13] to produce the full data for merits.

[14] And at the same time in the [15] conclusion, you state that Fry's arguments of [16] class plaintiffs can wait until after class [17] certification. Note, only a

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sample should be [18] rejected for the reasons expressed above.

[19] **MR. SMALL:** Yes.

[20] **SPECIAL MASTER POPPITI:** There is [21] some happy medium there somewhere, is there not?

[22] **MR. SMALL:** It's really separate [23] points. We certainly cannot wait until after [24] class certification for any production from

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[1] Fry's.

[2] **SPECIAL MASTER POPPITI:** I [3] understand.

[4] **MR. SMALL:** And ultimately, in the [5] case, we want a full production from Fry's, not [6] just a sample. The only thing we're saying in [7] the nature of a compromise is that we would take, [8] for class certification purposes, a sample if [9] Fry's agree to give us the full production later.

[10] **SPECIAL MASTER POPPITI:** Okay.

[11] **MR. SMALL:** So, Your Honor, there [12] really is no reason, even if Fry's could show [13] that the data are not necessary for class [14] certification, which we strenuously dispute, to [15] delay production any way, because AMD and Intel [16] seek the same data.

[17] And there's no reason to wait for [18] them. They don't face class certification [19] issues.

[20] Fry's also says that we haven't met [21] and conferred enough. It's probably the first [22] time I've heard that argument eight months after [23] we began meeting and conferring.

[24] We believe, based on the history of

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[1] the negotiations, Your Honor, that we would not [2] reach agreement with Fry's even through extensive [3] additional attempts at meeting and conferring, [4] because, number one, Fry's has taken its position [5] that it would not produce data absent [6] modification of the protective order. Something [7] we could not agree to.

[8] Second, just the history of the [9] negotiations shows that despite many attempts, we [10] have not made progress, at least before the [11] filing of the motion to compel with Fry's in the [12] negotiations. There's no reason to think that [13] would suddenly change.

[14] In fact, in the seven months [15] prefiling of the motion that we negotiated, we [16] never once got an offer from Fry's to produce any [17] data. Certainly none was produced.

[18] Fry's would not even agree to [19] produce the tiny sample that we had asked for [20] that would allow the parties

to identify the [21] precise fields that Fry's maintains that we [22] needed production of. So we could not get [23] cooperation from Fry's to advance the [24] negotiations really at all.

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[1] And third, since the filing of the [2] motion, we have had a discussion with Fry's about [3] what they would produce. And that proposal that [4] Fry's made to us, in our view, is wholly [5] inadequate. Really what it consists of is an [6] offer to produce one data point for each product [7] that Fry's sold during the relevant period.

[8] So for a particular computer [9] product, a particular model, or however they [10] define their different products, they would give [11] us one data point for the whole time period. Our [12] expert, who is handling the data work in the [13] case, submitted a declaration, a declaration of [14] Jonathan Orszag saying that that level of [15] aggregation, which by the way is compounded by [16] the fact that Fry's also wants to just give us a [17] sample of that data, which would necessarily [18] exclude some products, is simply not useful. We [19] can't use that for the purposes for which we need [20] to.

[21] So in our view, it's essentially an [22] offer that has no value to us. And we firmly [23] believe, Your Honor, all the meeting and [24] conferring would not get us where we need to be.

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[1] We unfortunately have to put the burden on the [2] Court to give us some assistance in moving the [3] negotiations forward.

[4] Fry's also talks about burden, but I [5] think their burden arguments rest on a couple [6] misunderstandings of what we're looking for.

[7] First of all, we do not — we are [8] not asking Fry's to change the form of the data [9] that they keep these to produce it to us. We're [10] asking them to produce to us as they keep it in [11] the ordinary course of business.

[12] Basically our request to Fry's is [13] to — for the fields we select, for the data [14] fields we select, to simply download the data in [15] those fields onto some medium that they can then [16] hand over to us.

[17] That's what we're asking for. There [18] should not be an excessive burden at all to do [19] that.

[20] Second, Fry's talks about the burden [21] of having to print out invoices that they keep in [22] electronic file invoice by invoice and then [23] having to redact customer identification [24] information from the invoices. I want to be

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[1] clear, Your Honor, we are not asking for [2] production of invoices that are going to be [3] printed out in hard copy.

[4] What we're looking for is data that [5] is input into a database that reflects the [6] transactions that Fry's has engaged in, both as a [7] buyer and a seller, that we can use to do the [8] kind of analysis we want. The invoices will not [9] do that in any way that's feasible.

[10] I mean, to try and input into a [11] data — create our own database basically from [12] invoices is a Herculean task that we're not [13] asking Fry's to produce to us or that we would [14] try to undertake in this case.

[15] Now, Fry's says why should we have [16] to produce data here when you're going to get [17] some of that data from other sources?

[18] And the short answer to that, Your [19] Honor, as we've said in our papers, is that most [20] of the data is not going to be available from [21] other sources. Certainly Fry's sales of its [22] computers to customers are really only, as a [23] practical matter, available from Fry's. We can't [24] go to each customer that walks in the door of a

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[1] Fry's store and subpoena that customer to turn [2] over the receipt or whatever they may have.

[3] I mean, they're not going to [4] obviously keep data. So that's not a feasible [5] alternative.

[6] As to purchases, we probably will [7] get production of some data that overlaps at [8] least in theory with what Fry's has. But there's [9] a few things.

[10] We don't know exactly the extent of [11] the overlap. Even if there is some overlap, [12] there may be gaps in another producing party's [13] data. There may be technical difficulties with [14] another party's data.

[15] There may be other flaws in the data [16] or the data may just not be as good. It may not [17] be as granular, for instance, as Fry's data.

[18] So we can't give up on Fry's data [19] simply because of the possibility that there may [20] be data out there that overlaps. And in any [21] event, it's not a bad thing to have production of [22] data from two parties as sort of cross checks [23] against each other for issues of accuracy, and [24] quality, and things like that.

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[1] On the sample issue, I think I've [2] basically addressed that.

[3] **SPECIAL MASTER POPPITI:** You have.

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[4] **MR. SMALL:** Fry's is saying don't [5] put us to the burden of producing the full data, [6] allow us to produce a sample — that issue, by [7] the way, mainly arises in the context of Fry's [8] confidentiality concerns. They're essentially [9] saying the less data we have to produce, the less [10] confidentiality concern we have.

[11] But I would submit, Your Honor, for [12] all the reasons that we discussed this morning, [13] that the protective order deals adequately, very [14] adequately with Fry's confidentiality concerns, [15] and they should have to produce the full set of [16] data, because the protective order gives them [17] adequate protection.

[18] And I would also submit, too, the [19] burden of producing a full set of data compared [20] to a sample is virtually the same. That because [21] we're dealing with electronics in a database that [22] can download onto a medium, whether they download [23] some of the data or all the data really is not [24] much different in terms of burden.

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[1] And, in fact, it may be easier just [2] to have it all downloaded rather than trying to [3] come up with a program that identifies some [4] subset of the data.

[5] And finally, to the extent Fry's is [6] complaining about the burden, we have offered [7] repeatedly to Fry's to give us a tiny sample of [8] the data which will allow us to focus the best we [9] can on the relevant fields that we have to have [10] for our purposes, and we will limit our requests [11] for production to just those fields.

[12] So if we can get any assistance from [13] Fry's in that regard, we can actually help reduce [14] the burden that they face.

[15] The only other area that I briefly [16] want to cover, Your Honor, goes to the issue of [17] relief. As you know, when we filed our original [18] opening briefs with the Court, we said just [19] simply tell Fry's it has to produce the data and [20] give it a deadline for doing so, because we [21] thought that if it had a deadline and [22] understanding that it had to produce data, the [23] parties and Fry's could sit down and negotiate [24] the details of the production.

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[1] We unfortunately have less [2] confidence in that process now, Your Honor, [3] because of the difficulty we've had post-filing [4] of our motion in getting a productive [5] conversation going to try and lead to an [6] appropriate production of data. And so we see as [7] key features of the relief that we now request [8] the following: First, make it clear to Fry's [9] that they must produce transactional

data in the [10] case.

[11] Second, Fry's should have a date [12] certain for completing the production. We [13] propose three weeks. I'm not going to say that [14] that's a date fixed in stone, but I think it [15] gives the Court a good idea of what we believe [16] the time frame is here for production.

[17] Third, Fry's should cooperate with [18] the parties to identify the fields that we [19] ultimately want production of. And that, of [20] course, involves production of a sample and [21] making available as needed Fry's IT people who [22] can explain and answer questions that we have [23] about the data sample.

[24] And third, make it clear that to the

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[1] extent the data are available — or fourth, I [2] should say, to the extent the data are available [3] in transactional form at a transactional level, [4] that they should be produced that way. If [5] they're not available at a transactional level, [6] then produce them at the level most disaggregated [7] as they exist.

[8] And one clarification in our papers, [9] Your Honor, we propose for the sample that it be [10] just for two SKUs for a two-day period. That's [11] probably sufficient, but with the clarification [12] that the SKUs have to be — they're among their [13] top selling SKUs, so we'll have enough data in [14] the sample that it will be meaningful.

[15] In other words, it's not going to be [16] sufficient if Fry's picks two SKUs that they had [17] virtually no sales of.

[18] So, Your Honor, unless —

[19] **SPECIAL MASTER POPPITI:** So I'm [20] looking at the reply with respect to the detail [21] of what you are requesting in terms of the [22] relief.

[23] **MR. SMALL:** Yes.

[24] **SPECIAL MASTER POPPITI:** You're

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[1] suggesting that number one be modified; correct?

[2] **MR. SMALL:** Yes. Just to make it [3] clear that the two SKUs that they would produce [4] the sample of would be SKUs that have a lot of [5] sales.

[6] **SPECIAL MASTER POPPITI:** Well, that [7] phrase may not ring to a number, SKUs that have a [8] lot of sales.

[9] I mean, I certainly can — were I to [10] grant the relief, I could write that language, [11] but I'm not sure how it translates.

[12] **MR. SMALL:** I could probably do [13] better than that by suggesting Your Honor that it [14] be SKUs that are among the top ten selling SKUs [15] that Fry's has.

[16] **SPECIAL MASTER POPPITI:** I would

[17] just like to note — I don't know if you want to [18] make any comments, Mr. Small, for the record, and [19] I expect it goes, to some extent, to the issue of [20] meet and confer.

[21] I am mindful of the March 12, 2007 [22] correspondence from Mr. Volin to Mr. Henri which [23] it previews your application. And what I would [24] suggest is precise detail. And it seems to me

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[1] that — well, it just does that.

[2] Do you have any comments about that [3] correspondence and what it does or does not [4] accomplish?

[5] Do you have that in front of you?

[6] **MR. SMALL:** I agree with the Court's [7] sentiment about that. I mean, throughout the [8] negotiations, it was our attempt to be clear and [9] be, you know, open and let Fry's know as best we [10] could exactly what we were looking for and what [11] our positions were on the different issues that [12] were raised in the course of the negotiations. [13] And this is a good example of the detail and the [14] effort that went into that process.

[15] **SPECIAL MASTER POPPITI:** Well, there [16] were some comments earlier in the morning in your [17] application that the subject of the subpoena was [18] somewhat of a moving target. I think that was [19] the phrase that was used.

[20] **MR. SMALL:** Yes.

[21] **SPECIAL MASTER POPPITI:** I'm mindful [22] of the fact that the focus was either tightened [23] or at least changed. Would you characterize what [24] you did as a moving target during the course of

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[1] the meet and confers? And if you don't, how [2] would you characterize what you did?

[3] **MR. SMALL:** The basic concept of [4] what we were looking for, I don't think changed. [5] We were looking for transaction level data, both [6] with respect to Fry's purchases of computer [7] systems with x86 chips and Fry's sales of those [8] same computer systems. That never changed.

[9] What did evolve in the negotiations [10] was our attempt to articulate specifically what [11] that would require Fry's to produce. And the way [12] that we came at it was to list for Fry's as best [13] we could, the fields that we thought they [14] maintain in their database that would give us the [15] necessary information.

[16] And I think the best example of [17] that, Your Honor, is the February 23rd, 2007 [18] letter from Mr. Volin to Mr. Henri which attaches [19] to it a list of the fields broken down into neat [20] categories that we were looking for, as well as [21]

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another attachment that gave a set of look-up [22] tables to try and minimize the volume of the data [23] that Fry's would have to —

[24] **SPECIAL MASTER POPPITI:** What was

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[1] the reference again, please?

[2] **MR. SMALL:** February 23rd, 2007 [3] letter from Mr. Volin to Mr. Henri. I would say [4] that our inability to more precisely than we did, [5] and I think we did it pretty precisely, but our [6] inability to more precisely define the data that [7] we were looking for was due, I believe, to our [8] inability to get Fry's to produce the data sample [9] or to give us a data dictionary that would [10] explain exactly what the fields are.

[11] If they had taken either of those [12] steps, we could have come back with a very [13] specific type request for the fields that we [14] wanted produced. But unless they are willing to [15] share that kind of information, all we can do is [16] give them a list of the type of fields we're [17] looking for.

[18] But it's really in their corner to [19] share the data with us so we can see what the [20] fields are. They keep — or for them to figure [21] out which specific fields they have that fit [22] within the categories of fields that we set out [23] in that February 23rd letter.

[24] **SPECIAL MASTER POPPITI:** Do you have

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[1] the reference to that in your exhibits, please?

[2] **MR. SMALL:** Yes. One second, [3] please.

[4] **SPECIAL MASTER POPPITI:** Sure. [5] Thank you.

[6] **MR. SMALL:** Your Honor, the February [7] 23rd letter is attached to the Volin [8] certification, which was filed with our initial [9] letter brief as Exhibit H.

[10] **SPECIAL MASTER POPPITI:** Just give [11] me one moment to relook at that.

[12] **MR. SMALL:** Sure. Thank you.

[13] **SPECIAL MASTER POPPITI:** Thank you.

[14] **MR. SMALL:** Sure. Thank you, Your [15] Honor.

[16] **SPECIAL MASTER POPPITI:** If counsel [17] would first turn your attention to the issue of [18] meet and confer, I'd appreciate it, please.

[19] **MR. STONE:** Your Honor, with respect [20] to the meet and confer and the fact that what [21] plaintiffs have been seeking is a moving target, [22] I think

further evidence for that is the fact [23] that plaintiffs' reply requests relief that [24] wasn't requested in plaintiffs' opening brief.

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[1] Plaintiffs' reply requests additional relief that [2] plaintiffs did not initially seek.

[3] This has been an evolutionary [4] process. Fry's has certainly made a good faith [5] effort to explain to counsel for plaintiffs why [6] it was that they had problems with the subpoena [7] and what it was willing to do if agreement could [8] be reached with respect to things such as the [9] protective order.

[10] **SPECIAL MASTER POPPITI:** That's what [11] I want to ask you. I mean, is it fair to suggest [12] that absent an agreement on the protective order, [13] literally everything else was a non-start?

[14] I mean, it may have been interesting [15] to look at. It may have been interesting to [16] start to frame, but absent an agreement on the [17] protective order, you were not going to agree to [18] produce the first piece of transactional data.

[19] **MR. STONE:** I think it depends on [20] how transactional data ultimately was defined and [21] agreed to by the parties. But certainly with [22] respect to the information that class plaintiffs [23] were seeking, absent some modifications to the [24] protective order, Fry's was unwilling to produce

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[1] information.

[2] **SPECIAL MASTER POPPITI:** And in [3] light of that, don't you expect that the dialogue [4] that you did have — and I'm aware of the [5] teleconferences, I'm aware of the Email strings. [6] I'm aware of the gaps in time between certain [7] pieces, if you will, of communication.

[8] Are you suggesting that there was [9] insufficient communication with respect to [10] detail? I understand it changed.

[11] **MR. STONE:** Well, I think at the end [12] of the day, Your Honor, counsel for plaintiffs [13] did not hear what Fry's was saying about the way [14] in which Fry's maintains its data, and I can get [15] to that in a little bit.

[16] **SPECIAL MASTER POPPITI:** Yeah. I [17] want you to do that.

[18] Are you suggesting that even today [19] counsel is mistaken as to how Fry's creates its [20] data, and how Fry's accesses its data and how [21] Fry's stores its data?

[22] **MR. STONE:** I believe they are, Your [23] Honor.

[24] **SPECIAL MASTER POPPITI:** Well,

with

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[1] that said, I'm satisfied that where the premise [2] of any meet and confer was, there had to be an [3] agreement with respect to change in protective [4] order; that that premise, because it was a [5] non-starter for the class plaintiffs, that there [6] was a sufficient meet and confer before the [7] filing of the instant motion. [8] Let's proceed to the merits then, [9] please.

[10] **MR. STONE:** Thank you, Your Honor.

[11] **SPECIAL MASTER POPPITI:** Thank you.

[12] **MR. STONE:** Counsel for the [13] plaintiffs noted during his argument that Fry's [14] is different from some of the other third parties [15] from which the plaintiffs have sought data. And [16] he's right.

[17] For instance, you were just talking [18] about SKUs. Fry's doesn't use SKUs.

[19] **SPECIAL MASTER POPPITI:** Right.

[20] **MR. STONE:** Counsel for Fry's, [21] Mr. Henri, has explained that to counsel for [22] plaintiffs on a number of occasions.

[23] In the meet and confer that began in [24] December, it didn't go back eight months like

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[1] counsel for plaintiffs suggest, but there was [2] some discussion about that.

[3] Fry's is also different in that it [4] is a private company. It is not a public company [5] like a number of the other third parties from [6] which the plaintiffs seek information.

[7] As a result, Fry's does not have the [8] same disclosure requirements as the other third [9] parties, and that has been the stumbling block in [10] connection with the negotiations.

[11] It's undisputed that the information [12] that the plaintiffs seek from Fry's is trade [13] secret, and they're seeking trade secret [14] information concerning millions and millions of [15] transactions. As a result, the plaintiffs have a [16] burden of making a particularized showing that [17] the information that they seek is relevant and [18] necessary.

[19] But even if the information is [20] relevant, discovery from a nonparty should not be [21] allowed where no need is shown, or where [22] compliance is unduly burdensome, or where the [23] potential harm caused by the production outweighs [24] the benefit.

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[1] And here Fry's submits plaintiffs [2] have not met their burden, not even in connection [3] with their reply brief. For the first time they [4] submitted their

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expert declaration of Mr. Orszag.

[5] And I probably have butchered his [6] name. I apologize.

[7] They have not made a particularized [8] showing that the information they seek is [9] necessary, particularly at the class [10] certification stage. They have not cited case [11] authority that says they need to rely on [12] imperical data to certify a class.

[13] In fact, the cases that they've [14] relied upon suggest to the contrary as we've set [15] forth in our brief.

[16] **SPECIAL MASTER POPPITI:** Well, let's [17] just talk about that for a moment. I mean, just [18] give me one moment, please.

[19] If counsel would indulge me, I'm [20] looking at Romero versus Philip Morris.

[21] **MR. STONE:** Yes, Your Honor.

[22] **SPECIAL MASTER POPPITI:** And I'm [23] mindful of the ultimate conclusion in Romero [24] versus Philip Morris. But isn't it fair to say

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[1] that what Romero versus Philip Morris did, what [2] the Court did in that case is it went through a [3] rather healthy exhaustive analysis of one [4] approach versus another?

[5] **MR. STONE:** That's correct, Your [6] Honor.

[7] **SPECIAL MASTER POPPITI:** And it came [8] up, if you will, with a decision that if I were [9] to turn to Intel right now, and I'm certainly not [10] going to do that, but if I asked Intel, do you [11] accept the Romero approach with respect to the [12] proof necessary at the stage of class [13] certification, do you think that Intel would be [14] happy with the Romero result?

[15] **MR. STONE:** I really can't speak for [16] Intel, Your Honor.

[17] **SPECIAL MASTER POPPITI:** I can't, [18] either. But it just seems to me what Romero did [19] was, certainly that Court made a decision, but [20] the decision in Romero and the decision in South [21] Dakota Microsoft antitrust litigation does not [22] bind this Court.

[23] Is that fair?

[24] **MR. STONE:** That's correct, Your

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[1] Honor. But —

[2] **SPECIAL MASTER POPPITI:** It may be [3] the better approach. It may be that this Court [4] will adopt that approach.

[5] But in my role as a special master, [6] the discovery phase of these proceedings, unless [7] there is law articulated which is either the law [8] of the case or this Court has spoken — has [9] written about the applicable law in this

case in [10] another context, in another case, looking at law [11] of the district where this action was instituted, [12] I'd have something to go by. But I don't know [13] that.

[14] At least if I do, I'm not aware of [15] it. And counsel for either side has not informed [16] me of that.

[17] Is that fair?

[18] **MR. STONE:** I believe so, Your [19] Honor. But what that highlights is that, at [20] most, what plaintiffs have shown is that they [21] might need this information.

[22] **SPECIAL MASTER POPPITI:** Well, they [23] need information. There's no question about [24] that.

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[1] And is counsel suggesting that a [2] plaintiff, insofar as a discovery is from a third [3] party, should be limited by virtue of what the [4] third party says the proof in class certification [5] should be?

[6] **MR. STONE:** In the context of [7] seeking highly confidential trade secret [8] materials where the materials need to make a [9] particularized showing that they're entitled to [10] the information, I think it's — they need to say [11] something more than we might need this [12] information.

[13] Given the potential for harm to [14] Fry's that exists, if this information is used [15] improperly, it's not enough for them to say on [16] reply in a declaration that we didn't have a [17] chance to deal with in opposition that we might [18] need this information.

[19] **SPECIAL MASTER POPPITI:** How can [20] they do that?

[21] I mean, how can they be more [22] particular than what they have been, accepting [23] their position for the moment without some [24] articulation of what the standard is in this

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[1] case, given the fact that this Court is sitting [2] in multi-district litigation?

[3] **MR. STONE:** Perhaps they can't be, [4] Your Honor, but we submit that given the record [5] that we've put in front of the Court, that [6] balancing the need for protection that Fry's must [7] have with respect to the information and the need [8] for the information that the plaintiffs have [9] demonstrated when comparing those two, and [10] weighing the respective burdens and looking at [11] whether or not plaintiffs have met their burden, [12] that in this case, you can say they don't need [13] Fry's information, particularly at the class [14] certification stage.

[15] **SPECIAL MASTER POPPITI:** Okay.

[16] You've made your point. Please.

[17] **MR. STONE:** They certainly haven't [18] articulated why it is they need data concerning [19] millions and millions of transactions at the [20] class certification stage. Fry's also is [21] different from the other third parties in this [22] case because it apparently does not maintain its [23] data in the same way that other third parties do.

[24] As we understand it, plaintiffs seek

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[1] individual transaction data for the sales of [2] computer systems. And plaintiffs' reply makes [3] clear that all they want is Fry's data as it [4] exists in the ordinary course of business.

[5] They've made that representation to [6] Fry's in connection with meet and confer [7] discussions. They've made that representation to [8] the Court in their papers. They've made that [9] representation today to the Court in open Court.

[10] Fry's has been telling plaintiffs [11] for months that it does not maintain data in the [12] format sought by plaintiffs. It does not [13] maintain data relating to individual [14] transactions.

[15] As the declarations that Fry's has [16] submitted make clear, Fry's database system [17] merchant master contains the categories of [18] information that are generally related to the [19] information plaintiffs seek. But as those [20] declarations also make clear, that information is [21] maintained in an aggregated form.

[22] So you can't extract the data from [23] that database where you can follow a purchase by [24] Fry's of a computer system and then the sale of

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[1] that computer system to an end user. [2] Instead, as I understand it, the [3] merchant master database aggregates purchase and [4] sale information by blue. So in the reply in the [5] declaration of Jonathan Orszag, plaintiffs' [6] expert suggests that the aggregate data that [7] Fry's has offered to produce and that Fry's [8] maintains, as we represented to counsel for [9] plaintiffs, is of no use to plaintiffs.

[10] And contrary to plaintiffs' expert [11] declaration suggesting that there are other [12] databases based on his knowledge of other third [13] parties, it is our understanding — my [14] understanding based on the investigation we've [15] conducted as part of our work here that there is [16] no other database that contains this information.

[17] **SPECIAL MASTER POPPITI:** You said [18] what again, please? There is no other?

[19] **MR. STONE:** That there is no other [20] database.

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[21] **SPECIAL MASTER POPPITI:** Thank you.

[22] **MR. STONE:** So because Fry's is [23] different in that regard and class plaintiffs [24] have suggested that the aggregate information

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[1] that Fry's maintains is not of use to them, as [2] Mr. Volin I believe said in his declaration would [3] not be meaningful, Fry's submits that it should [4] not be required to produce the information [5] requested.

[6] **SPECIAL MASTER POPPITI:** Let's have [7] a little bit of a dialogue, if you will, with [8] respect to that issue, Mr. Small.

[9] **MR. SMALL:** It's a little [10] frustrating, Your Honor, that we're at the point [11] where there's a lack of understanding apparently [12] about what data Fry's has and how it maintains [13] it. That's the very reason we've been asking for [14] production of a sample or something that would [15] explain what the data are that Fry's has.

[16] In all the correspondence I've [17] reviewed in connection with the meet and confers, [18] the only thing I've ever heard is that Fry's does [19] not keep the data on a monthly basis. And [20] because we had said produce your data sufficient [21] to show your monthly sales or your monthly [22] purchases, they said they didn't keep it in that [23] form.

[24] **SPECIAL MASTER POPPITI:** This

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[1] information, then, is it fair to say is new to [2] you —

[3] **MR. SMALL:** Well, —

[4] **SPECIAL MASTER POPPITI:** — as it's [5] been described today?

[6] **MR. SMALL:** I had an off the record [7] discussion with Fry's recently which we agreed to [8] keep off the record.

[9] **SPECIAL MASTER POPPITI:** Sure.

[10] **MR. SMALL:** But I did learn [11] information relevant to this topic for the first [12] time recently, very recently. But let me just [13] try and explain, if I can, Your Honor when Fry's [14] talks about the merchant master database and says [15] that it aggregates data into some more aggregated [16] form, the question immediately that I have is [17] where's the data coming from that it aggregates?

[18] My understanding of the merchant [19] master database is that it's an interface that [20] puts together data in certain forms for purposes [21] of reports that are generated using that [22] interface. And that it is drawing the [23] information, the data from some source to [24] aggregate it and to put it together into these

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[1] reports.

[2] So the question remains is: Where's [3] he getting the data from that it aggregates? And [4] we've never gotten an answer to that question, [5] Your Honor, and I don't know the answer.

[6] **SPECIAL MASTER POPPITI:** Have you [7] asked it?

[8] **MR. SMALL:** Yeah. We've asked them. [9] In fact, in the letter that we sent to the Court [10] in which we agreed to extend their time to oppose [11] our motion to compel to April 13th, they agreed [12] to describe the data that they keep and their [13] plan for producing it.

[14] Well, they only gave their plan for [15] producing it. We got virtually no description of [16] how they keep their data, what data they have.

[17] **SPECIAL MASTER POPPITI:** I'm [18] surprised you haven't mentioned that agreement [19] earlier in this proceeding. You want to focus on [20] that for a moment?

[21] I mean, there was an agreement to do [22] what you just suggested. Are you suggesting that [23] up to this point there has been, from your [24] vantage point, no description that is sufficient

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[1] for you to understand how the data is kept?

[2] **MR. SMALL:** I can certainly answer [3] for myself that I do not understand sufficiently [4] how Fry's keeps its data. I would encourage the [5] Court to, if the Court would like to hear from [6] Mr. Volin, who participated in all the [7] discussions, I believe, with Fry's, to see if he [8] has anything to add about that.

[9] **SPECIAL MASTER POPPITI:** Well, let [10] me ask this question, and just take your chair [11] there for a minute, Mr. Small.

[12] From my perspective, how can I make [13] some judgment with respect to this application if [14] I'm being told by Fry's that this is the way we [15] understand our data system from the class [16] plaintiffs? We're not sure we understand.

[17] How can I make some judgment with [18] respect to that if I have no record on which to [19] make my own judgment with respect to data, how [20] it's kept and the fields that you're asking for?

[21] I mean, I don't think that's an [22] unfair observation to make, is it?

[23] **MR. SMALL:** I have two suggestions, [24] Your Honor. Would you like me to come up to the

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[1] podium?

[2] **SPECIAL MASTER POPPITI:** No. You [3] can stay at counsel table.

[4] **MR. SMALL:** First of all, the Court [5] could certainly direct Fry's to produce the [6] responsive data in its most disaggregated form. [7] It has it.

[8] We're not, again, asking it to [9] change the form in which it keeps its data. I [10] said that earlier.

[11] But just give it to us as [12] disaggregated as you have it. That they can [13] certainly do.

[14] You know, second, I think as an [15] alternative that we don't prefer, but if the [16] Court would like us to do, we certainly would. I [17] mean, I think we made a lot of headway today.

[18] The Court has, you know, addressed [19] some important issues that have interfered with [20] our ability, I believe, to make progress with [21] Fry's, that if we can get enough clarity from the [22] Court on the other issues besides the particular [23] scope of the production or the particular nature [24] of the data to be produced, that with

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[1] encouragement from the Court to sit down, you [2] know, earnestly and in good faith to complete the [3] negotiation about the particular data to be [4] produced, that we could do that fruitfully.

[5] **SPECIAL MASTER POPPITI:** Please.

[6] **MR. STONE:** Your Honor, to go over [7] the point about whether or not this is the first [8] time class plaintiffs are hearing about how this [9] is, how Fry's maintains its data, and Mr. Henri [10] can address this further because he actually [11] participated in discussions, but my understanding [12] is that this has been a problem from the [13] beginning.

[14] Because Fry's information is not [15] maintained in such a way that you can track [16] individual transactions. And I believe that [17] counsel for Fry's, Mr. Henri, explained that, I [18] believe, to Mr. Volin.

[19] So this is not something that's [20] brand new here at the hearing. In addition, in [21] an effort to explain that and provide the Court [22] with a record which supports that, we did submit [23] two declarations. One from a Fry's IT person who [24] described ways in which the data is maintained in

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[1] merchant master, which happens to be a [2] proprietary system as described in [3] declarations —

[4] **SPECIAL MASTER POPPITI:** Right.

[5] **MR. STONE:** — developed by Fry's. [6] So there is a record before the [7] Court on this point.

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[8] **SPECIAL MASTER POPPITI:** And are you [9] satisfied that the record is complete on this [10] point?

[11] **MR. STONE:** I believe that the [12] record before the Court demonstrates that the [13] information that the plaintiffs were seeking that [14] Fry's has in its database is aggregated. And [15] given the declaration of plaintiffs' expert, the [16] plaintiffs' expert says that that information, if [17] it's aggregated, is of no use to them.

[18] **MR. SMALL:** Your Honor, I'm not even [19] sure we have clarity as to exactly how the data [20] at merchant master database is kept. But we [21] still don't have an answer to the question, and I [22] think it's very fundamental.

[23] Where does the merchant master [24] database get its data from that it puts into

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[1] these aggregate categories? Where is that data [2] coming from?

[3] **SPECIAL MASTER POPPITI:** Well, the [4] dilemma that I have is I'm not convinced at this [5] juncture, having read everything you've [6] submitted, that I can make a judgment on paper on [7] these papers. I mean, it seems to me that the [8] only way that I can have some degree of comfort [9] with any judgment that I would make is for there [10] to be some opportunity to have someone describe [11] under oath the data system and react to that by [12] testimony under oath. Because I'm not convinced [13] I can do it on these cold papers.

[14] Now, I understand that it is the [15] applicant's burden, but that doesn't make this [16] application go away if I'm not convinced that I [17] understand the nature of what we're looking for [18] here, and if I don't see it rising out of the [19] meet and confers. And I'm not sure that I do.

[20] So that I think I have two [21] alternatives here, a little bit different from [22] the way Mr. Small describes it.

[23] And that one of the alternatives is [24] to say you all go back to your respective places

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[1] and drill down on precisely what we're talking [2] about here and forge at least an understanding, [3] if you will, almost by stipulation that we [4] understand that this is what this system is. [5] This is what this system does. And as a result [6] of that, this is what we're asking for.

[7] And if that can't be accomplished, I [8] don't see any way I can deal with this short of [9] some hearing. Not argument, if you will.

[10] Now, you may have your witnesses [11] sitting right here. I don't know

whether you do [12] or don't.

[13] If you do, we may want to talk about [14] whether that can be done or whether you want it [15] to be done or suggest that it be done today. [16] Even if you do, you may want to be doing it in [17] short order on another day.

[18] And if you don't have your folks [19] here, then clearly we have to do it in short [20] order on another day.

[21] **MR. SMALL:** Your Honor, it seems to [22] me —

[23] **SPECIAL MASTER POPPITI:** You want to [24] discuss anything among yourselves off the record

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[1] at this point, because I'm happy to suggest that [2] you do that if you want to.

[3] **MR. STONE:** I'd certainly like to [4] have a discussion with my client, at a minimum.

[5] **SPECIAL MASTER POPPITI:** Certainly. [6] What time?

[7] **MR. STONE:** Could we say 15 minutes, [8] Your Honor?

[9] **SPECIAL MASTER POPPITI:** Is that the [10] right time? Sure.

[11] So we'll do ten minutes to 1:00 by [12] that clock or thereabouts. I think the clocks in [13] the courthouse are all the same.

[14] Okay. Thank you.

[15] **MR. STONE:** Thank you, Your Honor.

[16] (A recess was taken.)

[17] **MS. GRAHAM:** Thank you for waiting.

[18] **SPECIAL MASTER POPPITI:** Oh, not a [19] problem.

[20] **MR. STONE:** Much appreciated, Your [21] Honor.

[22] **SPECIAL MASTER POPPITI:** Thank you. [23] Please.

[24] **MR. SMALL:** Your Honor, we have

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[1] conferred with Fry's and talked among ourselves, [2] and I think there are elements of a procedure [3] that we agree with and elements that the parties [4] will present separately to Your Honor for your [5] consideration.

[6] **SPECIAL MASTER POPPITI:** I'm missing [7] some of what you're saying.

[8] **MR. SMALL:** I'm sorry.

[9] **SPECIAL MASTER POPPITI:** No, that's [10] okay. It's really dry in this room. I think [11] it's probably affecting all of us.

[12] **MR. SMALL:** We had a conversation [13] with Fry's —

[14] **SPECIAL MASTER POPPITI:** Yes.

[15] **MR. SMALL:** — in which we discussed [16] procedures going forward

with the goal of class [17] plans and presumably the other parties to the [18] litigation trying to understand exactly what the [19] data are that Fry's keeps that would be [20] responsive to our subpoenas.

[21] And the first part of the proposal [22] would be for class plaintiffs through two of [23] their — up to two of their experts and up to two [24] of their lawyers to meet informally with Fry's

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[1] who would make available to us their IT personnel [2] who have knowledge of their data to answer all [3] our relevant questions about the data that Fry's [4] keeps with the goal of hopefully permitting us to [5] fully understand what Fry's has and doesn't have [6] that's responsive to the subpoena. We propose [7] that that meeting occur within one week from [8] today.

[9] We further propose that if we do not [10] feel that we adequately understand what data [11] Fry's has based on the informal meeting, that we [12] then take, within one week after that, the 30(b)(6) [13] deposition of Fry's.

[14] So, in essence, that's what our [15] proposal is. And if —

[16] **SPECIAL MASTER POPPITI:** And by [17] proposal, does that mean that that has, in [18] substance, been agreed to?

[19] **MR. SMALL:** Only the first part, [20] Your Honor, about having the informal meeting has [21] been agreed to, but not the 30(b)(6) deposition.

[22] **SPECIAL MASTER POPPITI:** Well, you [23] were — I'm happy to hear, counsel. It sounds [24] like you were reading my notes.

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[1] **MR. SMALL:** And actually, Your [2] Honor, I did forget one part. I apologize. [3] It would be important to us before [4] the informal meeting with Fry's to receive a [5] sample of the data so that we can have a better [6] understanding of what's there to inform our [7] questions for the informal meeting.

[8] **SPECIAL MASTER POPPITI:** And you [9] discussed that as well?

[10] **MR. SMALL:** That part I'm not — I [11] think was with certain restrictions to protect [12] the confidentiality of that data sample. I think [13] Fry's, in concept, is agreeable to that.

[14] **MR. STONE:** Yeah, in concept. The [15] additional point was that whoever attends this [16] meeting on behalf of plaintiffs would sign an [17] undertaking that would have a heightened level of [18] confidentiality beyond the scope of the current [19] protective order, so that that information would [20] not be disclosed

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at all to anyone outside of that [21] meeting.

[22] That's what Fry's would propose.

[23] MR. SMALL: And it's acceptable to [24] us.

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[1] SPECIAL MASTER POPPITI: Okay.

[2] MR. SMALL: The concept would be [3] only the lawyers and the experts at the meeting [4] would have access to the information.

[5] SPECIAL MASTER POPPITI: Okay.

[6] MR. STONE: And what we would like, [7] Your Honor, is that information not be used in [8] any subsequent proceedings before the Court, so [9] that there's not a declaration from someone from [10] class plaintiffs saying Fry's told us this and [11] then that information is disseminated here in the [12] Court, given our concerns with the protective [13] order that's currently in place.

[14] SPECIAL MASTER POPPITI: Well, let [15] me make an observation before I ask you to kind [16] of — please be comfortable.

[17] MR. STONE: Thank you.

[18] SPECIAL MASTER POPPITI: Before [19] getting into the detail of what you were [20] discussing, what I want to make sure that I do [21] from my desk is to generate the proposed findings [22] and conclusions for Judge Farnan on the issue of [23] jurisdiction and on the issue of the protective [24] order.

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[1] I'm going to suggest just on those [2] two issues, in light of what I think is going on [3] here, not later than Tuesday or Wednesday of next [4] week. I mean, I'm going to be getting what you [5] are providing to me by close of business on [6] Friday, if I remember the count as you proposed [7] the number of days that you need.

[8] I'm also going to suggest to Judge [9] Farnan, in light of the importance of the issue [10] to keep things moving forward, that he shorten [11] the time within which you would have the [12] opportunity to take exceptions to that. You, by [13] virtue of the rule, are afforded 20 days.

[14] In light of the record that you've [15] made here today, and in light of the record I [16] expect you're going to be making by Friday, I'm [17] going to propose that Judge Farnan shorten the [18] time to three days within which you would take [19] exception to whatever I order.

[20] You can expect that the [21] jurisdictional piece is essentially what I did in [22] the courtroom today with some flesh on the bones [23] in terms of case

citations so that that record is [24] before Judge Farnan. And with respect to the

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[1] protective order, if I don't accept the approach [2] Judge Jordan took, not suggesting I'm not going [3] to look at it and not give it serious [4] consideration and perhaps may even accept it. [5] But if I don't, you can expect that the order and [6] the rationale for it is going to be substantially [7] what I did in the courtroom today.

[8] So I believe that the suggestion to [9] Judge Farnan to shorten the time to three days [10] gives you more than adequate time. I would do [11] that from my desk, but I don't believe I have [12] that authority under the rule.

[13] It seems to me that the rule which [14] enables the Court to appoint a special master [15] lays out some of the responsibilities of the [16] special master in that rule, and then calls out [17] the 20 days and says unless it is otherwise [18] shortened by the Court or words to that effect.

[19] I don't believe that I have that [20] authority, even though I know I have the [21] authority to issue orders. I know I have the [22] authority to issue findings, recommendations, et [23] cetera. But I don't believe I have the authority [24] to impact on that rule.

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[1] I will have some ex parte [2] communication as contemplated by the order that [3] appointed me with Judge Farnan only on the issue [4] of shortening the time within which to take [5] exceptions. And I anticipate I'll have that in [6] due course.

[7] If he believes or if he concludes [8] that I have the authority to shorten that time, [9] then you can expect that the time will be [10] shortened to three days. And the reason why I'm [11] doing that is because it seems to me it's [12] critically important to keep this issue on track [13] for ultimate decision, one way or the other.

[14] Now, let's get back to what I think [15] I heard part of, and I'm happy to listen to the [16] rest of it. I understand that there will be a [17] meet and confer informal. I understand that that [18] will involve some of your technical folks.

[19] And I understand that it will [20] involve some of your technical folks and [21] attorneys. I don't know whether those [22] individuals are going to be pre-identified prior [23] to the meeting. I expect that that would make [24] sense to do that in a document, if you will,

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[1] memorializing what you've done here.

[2] I also understand that what is — [3] what is — if this is agreeable, what is learned [4] during the course of that meeting is not going to [5] form the basis for any information ultimately [6] provided to the Court. I'm not sure I understand [7] that, because it seems to me if things fall [8] apart, at some point I'm going to have to be back [9] involved. And ultimately, I'm going to want to [10] know what this data is, and how it's kept, and et [11] cetera.

[12] MR. SMALL: Your Honor, I think [13] there are two situations where we would need to [14] be able to communicate to the Court what it is [15] that we learned during this informal meeting with [16] Fry's. One, is if we determine that the informal [17] meeting is not successful, that it doesn't give [18] us an adequate understanding of Fry's data, and [19] we come to the Court, unless the Court is [20] prepared now to put this in place and say we want [21] to take a deposition, I think we need to be able [22] to tell the Court why. You know, what it was [23] about, what we learned and didn't learn that [24] requires a deposition.

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[1] And then, second, you know if we get [2] to the point where we take a deposition, and [3] we're coming back to the Court, or even if we [4] don't take a deposition, but we are coming back [5] to the Court for further proceedings on our [6] motion to compel, we may — it will be, I think, [7] critical for us to be able to explain to the [8] Court what the data are that we're trying to [9] compel.

[10] SPECIAL MASTER POPPITI: Well, let [11] me make an observation before I hear what your [12] understanding or what agreement you may choose to [13] forge. [14] I, in fact, contemplated setting up [15] a process, not unlike what you have just [16] described, to include the opportunity for a [17] deposition. Now, whether or not it makes sense [18] to schedule that, if you will, in terms of time [19] frame, or whether it makes sense to go through [20] the meet and confer within the time frame you [21] describe, if it doesn't work to get back to me, [22] and have some discussion about whether a 30(b)(6) [23] goes forward. I just don't want to be wasting [24] your resources, and by virtue of you using my

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[1] resources, spending your resources. [2] So, if it's — if it is a matter of [3] a two-step, so long as the two-step proposes a [4] very short time frame, then I'll do a two-step. [5] I like to dance.

[6] MR. STONE: On the two-step point — [7] SPECIAL MASTER POPPITI: Just [8]

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kidding. I said I like to dance. I'm sorry.

[9] **MR. STONE:** I would propose that we [10] do it that way. And that within 24 hours of the [11] meeting out in California, we report back to you [12] with either this issue is now resolved —

[13] **SPECIAL MASTER POPPITI:** Or isn't.

[14] **MR. STONE:** — or isn't. And then we [15] see what the step is, because it could well be [16] that we have a fruitful discussion.

[17] **SPECIAL MASTER POPPITI:** Right.

[18] **MR. STONE:** And it makes sense to [19] have another discussion —

[20] **SPECIAL MASTER POPPITI:** Right.

[21] **MR. STONE:** — rather than going to [22] something like a deposition.

[23] **SPECIAL MASTER POPPITI:** I'm [24] amenable to doing it in that fashion. What I'd

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[1] like you all to do if you wouldn't mind is lay [2] this out with dates certain and dates certain to [3] include me at the end of that meet and confer, if [4] you wouldn't mind making the call to my office [5] sometime this afternoon and checking with Mary [6] Levant to see what my availability could be [7] consistent with what I know I would like to see. [8] And that is expedited.

[9] **MR. STONE:** And if I may, Your [10] Honor —

[11] **SPECIAL MASTER POPPITI:** And also [12] weave into that document, if you will, the [13] discussion about confidentiality, heightened [14] confidentiality that you will be making in this [15] for purposes of doing this business.

[16] **MR. STONE:** Given that some of us [17] are traveling back to the West Coast today, would [18] it be okay if we were to get back to you by close [19] of business tomorrow?

[20] **SPECIAL MASTER POPPITI:** Absolutely.

[21] **MR. STONE:** Thank you, Your Honor.

[22] **SPECIAL MASTER POPPITI:** Yes.

[23] **MR. SMALL:** And I just want to be [24] clear, Your Honor, that this schedule we're going

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[1] to put in place will include production of the [2] sample data by Fry's.

[3] **MR. STONE:** I mean, conceptually, [4] although, Mr. Henri needs to speak to some people [5] at Fry's before we can actually agree to that in [6] advance.

[7] **SPECIAL MASTER POPPITI:** Well, let [8] me ask this question, because I expect I have the [9] authority to order it, and you've got the right [10] to take exception to it, which puts us all in a [11] balloon of

stall, if you will. And I don't mean [12] to suggest that's not appropriate.

[13] That's what the rules contemplate.

[14] That's the authority that I have.

[15] I'm inclined to expect that making a [16] sample makes sense particularly in the context of [17] your having forged an agreement with respect to [18] the utilization of that information. And the [19] expectation that your agreement, even though it [20] is different from the protective order, I will [21] sign it as an order and expect full compliance [22] with that order.

[23] And if there isn't, I understand the [24] work that — the very important work this Court

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[1] does, all the time dealing with highly [2] confidential information. And I know from [3] conversations I've had with Judge Farnan and with [4] other judges of the Court that they take it very [5] seriously. And I can assure you that if there's [6] a violation of any confidence, that I will deal [7] with it as severely as I think I should.

[8] **MR. STONE:** I appreciate your [9] comments, Your Honor. Given that there's some [10] additional people at Fry's who would have to make [11] this decision, I'm not in a position to do that.

[12] **SPECIAL MASTER POPPITI:** I respect [13] that.

[14] **MR. STONE:** But it's something we [15] can address in our correspondence with you [16] tomorrow.

[17] **SPECIAL MASTER POPPITI:** Okay. And [18] your colleagues, your clients can expect that if [19] there is no agreement with respect to a sample, [20] that I am inclined to order one.

[21] So to the extent it should be [22] described, then you should describe it in the [23] context of serving up to me your agreement, which [24] I will order. And in the context of saying we

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[1] have not been able to agree to this, this is what [2] we'd like to see. This is what we'd like not to [3] see.

[4] Please.

[5] **MS. GRAHAM:** Your Honor, I just [6] wanted to address the issue of the parameters on [7] this meeting. And I got the sense that Your [8] Honor was not clear about why we might be asking [9] to have the meeting off the record, if you will.

[10] And I wanted to just make the point, [11] and it relates a little bit to this two-step — [12] one step, as Your Honor pointed out, if we get to [13] a point where there's a step that's an [14] affirmative order, and if it implicates our [15]

concerns with respect to confidentiality and also [16] relevance, then we're faced with having to make a [17] choice of whether to appeal that. And as you [18] said, there's the stall concern.

[19] **SPECIAL MASTER POPPITI:** It's built [20] in. Sure.

[21] **MS. GRAHAM:** Yeah. It's just built [22] in.

[23] So the point of having this meeting [24] was really in our interest — and I think both

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[1] sides maybe proposed it, but we certainly did — [2] was two-fold. One relates to having something [3] productive and the other relates to protecting [4] our concerns.

[5] So, I mean, we all know if we give a [6] deposition, that will be subject to the rules of [7] a deposition. And often it's just harder to have [8] the kind of give and take and really get down to [9] really what you can understand.

[10] When we were talking while Your [11] Honor was waiting for us, I mean, we each had [12] questions of the other of, you know, what is it [13] you're looking for, because we don't get that. [14] And, you know, you can ask those questions.

[15] In a deposition, you're not going to [16] have that. So they would get their shot at [17] making whatever record they could. And, [18] obviously, we're not going to be interested in [19] helping them make a record.

[20] **SPECIAL MASTER POPPITI:** I [21] understand that.

[22] **MS. GRAHAM:** And so that — so my [23] experience, if you have something that's, you [24] know, more like a real meeting between real

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[1] people, it can be productive. And I would hope [2] this is productive.

[3] And then, of course, the other [4] reason is simply that if we have an order now [5] that as I mentioned implicates our concerns, then [6] you know, we have to decide whether or not to [7] appeal that. So if it were subject either to [8] confidentiality issues that are — you know, that [9] don't have the protections that Fry's thinks it [10] should have, and also ordering us to give [11] information that we think is not relevant, you [12] know, we have to decide, for example, whether [13] under, you know, trade secret law we really want [14] to pursue that.

[15] So that was the reasoning for our [16] wanting to have this meeting.

[17] **SPECIAL MASTER POPPITI:** Informal.

[18] **MS. GRAHAM:** Off the record meet-

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ing.

[19] **SPECIAL MASTER POPPITI:** Well, and I [20] understand the concerns. And it seems to me, [21] correct me if I'm mistaken, please, I would [22] prefer that the opportunity is full, fair and [23] open. And if there's an expectation that [24] something coming out of that meeting literally

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[1] comes back to help in the same form and that [2] chills the opportunity to, in good faith, meet [3] and confer that, I'm not wanting to do that.

[4] At the same time, if it falls apart, [5] then it seems to me what is likely to occur is [6] the record then gets made through a 30(b)(6) [7] deposition. So you have it, but you have it [8] later in a different context.

[9] **SPECIAL MASTER POPPITI:** And I [10] realize that may not be the most efficient, but [11] what I'm not wanting to do is have to — I don't [12] want to have to measure the good faith in terms [13] of what goes on during that meeting or meeting to [14] follow by virtue of having to literally eavesdrop [15] later on in that meeting process.

[16] And if stepping back from that, [17] saying you can't use anything in that meeting to [18] come back to me, other than the fact that it [19] failed and you've got to come back and gather [20] that same information, if you will, on the record [21] with a 30(b)(6), I'll stand aside.

[22] **MR. SMALL:** Your Honor, we can [23] handle it that way. Remember, the purpose of the [24] meeting is for us to understand what data Fry's

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[1] has.

[2] And so I think there's one or two [3] outcomes of that meeting. One, we understand [4] Fry's data, in which case most likely we're going [5] to ask for whatever they have available to be [6] produced.

[7] You know, unless they convince — I [8] suppose it's possible that it's totally [9] valueless —

[10] **SPECIAL MASTER POPPITI:** Right.

[11] **MR. SMALL:** — or we don't understand [12] it, in which case we'll need to take a [13] deposition.

[14] **SPECIAL MASTER POPPITI:** I [15] understand.

[16] **MR. SMALL:** Now, if it's the former, [17] then how do we get back to the Court and say, [18] okay, we now understand this is what Fry's data [19] is? We want the following to be produced.

[20] And so really what I think it means [21] is — it's okay, but I think what it means is [22] that we would have to do a 30(b)(6) deposition [23] after this meeting which

we can do. I would just [24] suggest if we're going to have to do it, let's

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[1] set up a time right now for that to happen.

[2] **SPECIAL MASTER POPPITI:** Well, I [3] think that what I'm hearing is that that's what [4] Fry's is proposing, and I don't want in any [5] fashion to chill that meet and confer. So it [6] will have to be a two step, if you will.

[7] At the same time, and even though [8] you may not need the date, I will require that [9] you set at least parameters, outside dates for [10] deposition.

[11] Okay.

[12] **MR. SMALL:** Thank you.

[13] **SPECIAL MASTER POPPITI:** So I'll be [14] looking for a form of order when? Close of [15] business tomorrow?

[16] **MR. STONE:** Yes, Your Honor.

[17] **MR. SMALL:** Yes.

[18] **SPECIAL MASTER POPPITI:** Okay.

[19] Good.

[20] Any other matters then for today [21] please?

[22] **MR. SMALL:** Not for the class, Your [23] Honor.

[24] **MS. GRAHAM:** Your Honor, there is

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[1] one matter. When Mr. Small initially spoke this [2] morning, he revealed certain data from one of the [3] declarations that we had put under seal, data [4] about Fry's sales.

[5] And so we would ask to — we'd like [6] to have that information redacted from the [7] transcript, at least the public version of the [8] transcript.

[9] **SPECIAL MASTER POPPITI:** Mr. Small.

[10] **MR. SMALL:** No objection, Your [11] Honor, as long as there is a version that's [12] complete that the parties can use.

[13] **MS. GRAHAM:** I think it was only two [14] sentences or so.

[15] **SPECIAL MASTER POPPITI:** I will [16] leave it to you to talk about what several [17] sentences are involved, and therefore, leave it [18] to you to propose the redacted version of the [19] transcript before lodging the transcript.

[20] **MS. GRAHAM:** Sure.

[21] **MR. SMALL:** Thank you.

[22] **SPECIAL MASTER POPPITI:** And the [23] transcript would be available when, please?

[24] **THE REPORTER:** Tomorrow.

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[1] **SPECIAL MASTER POPPITI:** Tomorrow. [2] Thank you. Thank you, all.

[3] (Hearing was concluded at 1:50 p.m.)

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State of Delaware
New Castle County

CERTIFICATE OF REPORTER
I, Heather M. Triozzi, Registered Professional Reporter, Certified Shorthand Reporter, and Notary Public, do hereby certify that the foregoing record, Pages 1 to 118 inclusive, is a true and accurate transcript of my stenographic notes taken on May 1, 2007, in the above-captioned matter.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 2nd day of May, 2007, at Wilmington.

Heather M. Triozzi, RPR, CSR
Cert. No. 184-PS

Lawyer's Notes

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